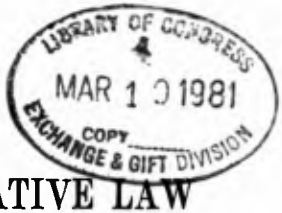
GOVERNMENT CONTRACTORS PRODUCT LIABILITY ACT



HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 5351

GOVERNMENT CONTRACTORS LIABILITY ACT

JULY 21, 1980

Serial No. 56

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GOVERNMENT CONTRACTORS PRODUCT LIABILITY ACT

MONDAY, JULY 21, 1980

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 2226, Rayburn House Office Building, Hon. George E. Danielson (chairman of the subcommittee) presiding.

Present: Representatives Danielson, Harris, Barnes, Moorhead, and McClory.

Also present: William P. Shattuck, counsel; Janet S. Potts, assistant counsel; Alan F. Coffey, Jr., associate counsel; and Florence McGrady, clerk.

Mr. DANIELSON. A quorum being present, the subcommittee will come to order.

The program for this morning is to consider the bills H.R. 5351 and H.R. 5358.

[A copy of H.R. 5351 follows:]

I

96TH CONGRESS
1ST SESSION

H. R. 5351

To provide Government indemnity for suppliers of products to the Government in certain cases in which such suppliers become liable for loss with respect to those products, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 1979

Mr. GUDGER (for himself, Mr. DERWINSKI, Mr. ERLENBORN, Mr. FORSYTHE, Mr. VOLKMER, Mr. HALL of Texas, Mr. PEPPER, Mr. PRITCHARD, and Mr. WYATT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide Government indemnity for suppliers of products to the Government in certain cases in which such suppliers become liable for loss with respect to those products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Government Contractors' Product Liability Act of 1979".

DECLARATION OF PURPOSE

SEC. 2. It is the purpose of this Act to establish just standards of ultimate liability for suppliers of products to the United States Government by providing indemnity for those suppliers in certain instances in which the United States Government is logically responsible for the harm creating the supplier's liability but cannot be required to provide indemnity because of sovereign immunity.

EXCLUSION OF EXTENSION OF STATUTES OF LIMITATION

SEC. 3. Section 205 of the Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C. App. 525) does not affect any limitation on the filing of an action or other proceeding against a supplier of a product to the United States Government to enforce any liability of such supplier with respect to that product.

GOVERNMENT INDEMNITY

SEC. 4. (a) The United States Government shall be liable as indemnitor for any loss experienced by a supplier of a product to the United States Government because of the supplier's liability arising from a characteristic of a product supplied to the United States Government or the supplying of such product, if such characteristic was required of that supplier by the specifications for the product imposed by the United States Government, unless such supplier has expressly contracted not to be so indemnified.

(b) The United States consents to be sued for indemnity under this Act in any Federal court having jurisdiction over the subject matter and, by way of interpleader or otherwise, in any State or Federal court having jurisdiction over a civil action to recover a claim which may give rise to such indemnity.

APPLICATION WITH RESPECT TO CERTAIN FOREIGN MILITARY SALES AND AID

SEC. 5. A product supplied to a foreign government or faction under a Federal program or project in the nature of a military sale or foreign aid shall be considered a product supplied to the United States Government for the purposes of this Act.

DEFINITIONS

SEC. 6. As used in this Act—

(1) the term "supplier" includes a contractor and subcontractor;

(2) the term "product" includes any combination or subassembly of products;

(3) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States;

(4) the term "specifications" includes designs, plans, drawings; and

(5) the term "United States Government" includes any unit or part of the National Guard of any State.

96TH CONGRESS
1ST SESSION

H. R. 5358

For the relief of Stencel Aero Engineering Corporation.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 1979

Mr. GUDGER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

For the relief of Stencel Aero Engineering Corporation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to Stencel Aero Engineering Corporation of Arden, North Carolina, the sum of in full settlement of all claims against the United Stated by such corporation for losses sustained by it as a result of settling a claim of the heirs of Captain James Donald Werner, California Air National Guard, who was killed as a result of a mal-

functioning parachute pack manufactured by Stencel Aero Engineering Corporation pursuant to a defective design provided by the Department of Defense.

Mr. DANIELSON. I would like to point out at the inception that H.R. 5351 is in the nature of a general law bill. H.R. 5358—both of these bills incidentally having been authorized by Representative Lamar Gudger—5358 is a private bill for the relief of Stencel Aero Engineering Corp.

The two bills treat of the same subject matter, however, and for purposes of convenience, and in line with our usual procedures in this subcommittee, we will take up the subject matter involved, and then at the appropriate time try to work the subject matter into one or both bills, reflecting the consensus of the opinion of the subcommittee.

The general nature of these bills is to provide for the indemnification by the U.S. Government of contractors with the U.S. Government who furnish materials to the Government, in accordance with specifications set up by the Government. In other words, to provide a products liability backup for the independent organizations, the business organizations which contract with the Government for the purpose of providing the Government with materials according to Government specifications.

I would like to point out at the outset that these two bills were introduced back on September 20, 1979, simultaneously; that is, the same day. Shortly thereafter I requested comments from interested Government agencies as follows: On October 1, 1979, by letter I requested comments on the bills from the Honorable Roland G. Freeman III, Administrator of the General Services Administration. We have not to date received a reply from the General Services Administration.

On October 1, 1979, by letter I requested comments from the Honorable Harold Brown, Secretary of the Department of Defense. This morning, July 21, 1980, we have received a response from the Department of Defense, but since the time I received it, 28 minutes ago, I have also received word that one page is going to be changed, so I do not really know what their attitude is.

On October 1, 1979, by letter directed to the Honorable Benjamin Civiletti, Attorney General, Department of Justice, I asked for the comments of the Department of Justice on the bills. To date we have received no reply.

On November 19, 1979, by letter I asked the Honorable Lester Fettig, Administrator for Federal Procurement Policy of the Executive Office of the President, for its comments, and to date we have received no reply.

Mr. HARRIS. Mr. Chairman, if I may suggest, that Office as far as I know still does not have a head. The gentleman you referred to is no longer the head of it and has not been.

Mr. DANIELSON. Probably does not have a body as well as a head.

Mr. HARRIS. That could be, Mr. Chairman.

Mr. MOORHEAD. Is it worthwhile creating a new head for such a short time?

Mr. DANIELSON. Come now, gentlemen. We will proceed with the hearing. I see that we have our two sidemen here today to bring a little light to the hearing. I will point out at the inception that I have a letter from Congressman Lamar Gudger of North Carolina, in which he expresses his regret at not being able to be here today, but he has submitted a written statement, and has requested permission to

appear at a later hearing which will be held, so that he can explain his position personally. He has an unavoidable conflict. Without objection, Mr. Gudger's letter will be received in the record.

There is no objection. It is received. Likewise, Mr. Gudger's statement in support of the bills without objection will be received in the record.

[The information follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C. July 18, 1980.

Hon. GEORGE DANIELSON,
Chairman, Subcommittee on Administrative Law and Government Relations,
Washington, D.C.

DEAR MR. CHAIRMAN: Some time ago, I committed myself to attend a board meeting in New York at 10 a.m. on Monday, July 21. This confronts me with a conflict which prevents me from attending the hearings set for that date and time on my bill, H.R. 5351, the Government Contractors Product Liability Act. Since this meeting was scheduled at this time at my request, I feel obliged to attend. My absence there would prove embarrassing and have a serious effect on my business relationship with this corporation.

I have prepared an opening statement which is in the hands of your Subcommittee staff and would be most grateful if you would permit it to be made a part of the record. Inasmuch as a later hearing involving the Justice Department and the American Bar Association is contemplated to develop careful legal analysis of the bill, I would appreciate the opportunity to testify at that time. In the interim between these hearings, I will be happy to consult with you or the other members of the Subcommittee at your convenience.

It is my understanding that Congressman McClory is interested in the bill and possesses superior knowledge of its application to a particular manufacturing concern in his district. I understand that your staff has been working to accommodate his concerns in these hearings.

I am deeply grateful for the consideration you are giving the serious problem addressed by this legislation and regret that I will not be present to express my gratitude in person.

Sincerely,

LAMAR GUDGER,
Member of Congress.

GOVERNMENT CONTRACTORS PRODUCT LIABILITY ACT OF 1979, H.R. 5351, REMARKS OF CONGRESSMAN LAMAR GUDGER BEFORE THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

Mr. Chairman, and members of the Subcommittee, I want to thank you for giving me and these other witnesses the opportunity to comment on this bill, H.R. 5351, the Government Contractors Product Liability Act of 1979. I introduced this bill because of a serious problem facing government contractors growing out of the Supreme Court decisions in *Feres* v. *United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corporation* v. *United States*, 431 U.S. 666 (1977). In these cases the Court extended the principle of sovereign immunity to prohibit government indemnification of contractors who are held liable in products liability lawsuits by government employees.

As a result of these decisions, government contractors are increasingly being forced into court in every state in the union to defend against litigation brought by service personnel, expending vast amounts in legal fees and if they lose, even though the damage complained of resulted from a faulty government design, they have no recourse against the government absent the enactment of private legislation by Congress. The government contractor today faces huge product liability insurance premiums, vast exposure to tort liability, no indemnity if he produces no faulty government specifications and liability for breach of contract if he does not. Aside from being inequitable, this dilemma results in higher prices for the government, higher taxes for the public and products that are less safe for the user.

The case of Stencel Aero Engineering Corporation v. Werner, a case arising after the Court's 1977 decision in *Stencil Aero Engineering Corporation* v. *United States*, illustrates the contractor's problem. In that case Stencil paid $199,000 dollars to settle a claim arising when a parachute pack component manufactured by Stencil failed causing the death of a California Air National Guard Captain. In order to recover under the California strict liability law, Captain Werner's heirs had only to show that Stencel had manufactured the pack and that the pack proximately caused Captain Werner's death. Thus Stencel was liable with no recourse against the government except through private legislation even though military engineers knew of the defect and even though Stencel had unsuccessfully urged the Air Force to adopt a suitable remedy. I expect Mr. Fred Isreal, attorney and Vice President of Stencel, will be able to answer any questions the Subcommittee might have about this case when he testifies later.

Mr. Chairman, this bill has broad industry support, it has fourteen co-sponsors including three other members of the Judiciary Committee and is supported in principle by the Public Contracts Section of the American Bar Association. I commend it to your attention, and with the conclusion of this hearing today involving the Department of Defense and government contractors, and a hearing contemplated in the future involving the Department of Justice and the American Bar Association hope that it can be acted upon in the next Congress.

Thank you again for your interest in this legislation. I will be glad to attempt to answer any questions you may have about the bill now or in the future, and I will make myself available at your convenience.

PURPOSE

This bill would provide for the indemnification of the claimant for losses sustained in the settlement of a products liability claim made by the estate of Captain James Donald Werner, California Air National Guard.

BACKGROUND

During the late 1960's, Stencel Aero Engineering Corporation performed several contracts for the United States Air Force for the development of ejection seat upgrade kits, including the parachute for F–102 aircraft. These contracts provided that the parachutes be in conformance with Air Force approved designs and that the claimant could not deviate from the Air Force approved designs without a change order from the Air Force.

After Stencel completed the first production contract, Air Force tests on some parachutes indicated a design defect in the original specifications. Stencel urged the Air Force to change the parachute design and recommended a particular design change.

After refusing to permit Stencel to implement its proposed design change, the Air Force designed a change which it believed would eliminate the problem. The Air Force then ordered Stencel to fabricate parachutes in accordance with the Air Force design change.

On July 27, 1971, an Air National Guard F–102 aircraft which contained the Stencel-manufactured parachute was on a routine training mission near Fresno, California. The aircraft developed engine trouble in the course of its flight and the pilot, Captain James Donald Werner, was forced to eject. During the ejection sequence, Captain Werner sustained injuries which resulted in his death.

Following the accident, an Air Force investigation concluded that Captain Werner's death was directly attributable to and caused by the defective design of his parachute pack, which Stencel had manufactured according to the Air Force's changed specifications.

After Captain Werner's death, the Air Force adopted a second design change which was similar to that orignally suggested by by Stencel but rejected by the Air Force. Since the second design change, there have been no accidents due to a "defective design"

The estate of Captain Werner initiated a suit against Stencel for his death on the basis that the parachute had a defective design. As a result of the settlement of that suit, Stencel paid damages to the estate, incurring costs in the amount of $189,000.

After paying the settlement, Stencel sought indemnification from the government, first through an administrative claim and then through the courts. All claims were denied, with the Supreme Court of the United States finally ruling in 1977 that:

> . . .the third party indemnity action in this case is unavailable for essentially the same reasons that direct action. . . is barred by *Feres*.

In *Feres*, the Supreme Court had held that active duty military personnel are barred from seeking damages against the federal government under the Federal Tort Claims Act because the primary purpose of that act is to extend a remedy to those who had been without one and that, because of the complete benefit systems for the armed services, military personnel had other remedies.

Stencel, which has exhausted all other remedies, seeks legislative relief on the basis that it has been required to pay for the Air Force's defective specifications and its refusal to heed Stencel's warnings of design defect. Stencel claims to have done all it could to avoid the production of a defective product, and that the fault lies with the Air Force, which should now be required to indemnify Stence for its losses.

DEPARTMENTAL REPORTS

Defense. Unfavorable.—This claim has been fully adjudicated. The Supreme Court has applied the rationale of *Feres* to suits brought by third parties for contribution and indemnification on claims paid to members of the armed services. The indemnification of Stencel would be unfair to others who are similarly situated.

Mr. DANIELSON. That brings us now to witnesses who are in attendance. I will call first upon Mr. John Geaghan of Raytheon Co., chairman of the legal committee, I assume of National Security Industrial Association. Will you not please come forward, be comfortable.

I believe we do have a statement, sir, from you. We do. I am going to make this suggestion. You do have, and I thank you you for it, a summary attached to your statement I would like if you are willing and feel able, to just go on through and make your presentation as best you can. Most lawyers can do a better job ad lib than they can reading a text anyway.

TESTIMONY OF JOHN GEAGHAN, RAYTHEON CO., CHAIRMAN, LEGAL COMMITTEE, NATIONAL SECURITY INDUSTRIAL ASSOCIATION

Mr. GEAGHAN. Thank you very much, Mr. Chairman, Mr. Reporter, staff. It is a real pleasure to be here today. I have filed a statement previously, including a 1-page summary, so I will not, as you indicated, read that.

Mr. DANIELSON. Without objection the entire statement will be received in the record. Now I would like to have you make your best points.

[The information follows:]

SUMMARY

The dramatic growth in product liability including the enlargement of strict liability theories and the expansion of provable damages to include economic loss has caused substantial increases in product liability premiums due to:

(*a*) Insurance rate-making practices;
(*b*) Design and manufacturing practices; and
(*c*) Tort litigation system.

The cost of insurance premiums or self-insurance coverage is a function of pricing the product to the customer, which is impacted by:

(*a*) Economic reality of larger deductibles (retentions) to mitigate increasing cost of insurance premiums;
(*b*) Encouragement by Government auditors of larger deductibles to be assumed by Government contractors; and
(*c*) Custom-type product—lack of historical base for risk spreading. The Government contractor is in a more precarious product liability risk position vis-a-vis third parties than is a manufacturer of most commercial products due to:
(*a*) The contract relationship with the Government;
(*b*) The sovereign immunity doctrine;
(*c*) The nature of the product; and
(*d*) The mission of the user.

The present status of the law illustrated by the recent case, *Stencel Aero Engineering* v. *U.S.*, 431 U.S. 666 (1977), precludes the right of claim over against the Government following determination of third party liability even where the product conforms to Government contract specifications. H.R. 5351 would do much to overcome such serious inequities.

Section 4(a) of H.R. 5351 should be revised to indemnify the Government contractor in all cases where the product furnished or service rendered complied with the contract specification at the specification at the time of delivery of the product or acceptance of the service.

The original language of Section 4(a) otherwise raises questions as to who, when and how a specification is "imposed" in a Government contract, the answers to which are often unclear.

STATEMENT OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION TO THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENT RELATIONS OF THE HOUSE COMMITTEE ON THE JUDICIARY, RE H.R. 5351

The National Security Industrial Association greatly appreciates the opportunity to appear before this Subcommittee to testify in support of H.R. 5351, the Government Contractors Product Liablity Act of 1979.

NSIA was founded in 1944 at the instance of James Forrestal, then Secretary of the Navy and later the first Secretary of Defense. It is a nonprofit, nonpolitical association of approximately 280 American industrial, research and educational organizations of all types and sizes, representing all segments of defense in all parts of the United States. NSIA's purpose is to foster effective working relationships and communications between industry and the government in matters relating to national security.

The National Security Industrial Association expresses its support for H.R. 5351, a bill to provide Government indemnity for suppliers of products to the Government which comply with contract specifications. We believe that this legislation is long overdue and would help very much to overcome serious inequities and problems involving Government contractor's product liability to third parties reflected in cases such as *Stencel Aero Engineering Corporation* v. *U.S.*, 431 US 666 (1977).

While the Government contractor is in a rather unique product liability risk position, it is instructive to review the general problems of product liability associated with any manufacturer in either a commercial or Government procurement setting.

Several years ago, Jury Verdict Research, Inc. reported that over 200 people in the U.S. had won damage suits in amounts of $1 Million or more since the year 1959; that the number of such awards increased dramatically to 43 in 1976 alone; and that the average lawsuit award had increased over 500 percent (from $12,000 to $80,000) in the last eight years covered by the report.

Payments by the manufacturer, whether by way of insurance premiums or out of pocket for noninsured risks, must ultimately be recognized as a function in the pricing of products and as such is of vital interest not only to the manufacturer but also to its customers.

Insurance premiums covering such risks have risen dramatically. In some cases and depending upon the particular product, the increase has been as high as 5,000 percent over the past ten years. With such increases in insurance rates, some manufacturers have opted to increase their risk participation by increasing their so-called retention (deductible) in an attempt to hold down insurance costs and, in some cases, manufacturers have gone out of business.

That product liability as a field has itself grown in complexity becomes apparent when one realizes that not many years ago product liability cases tended to be associated primarily with products designed for human consumption (i.e., processed food and drink cases involving the occasional insect, piece of glass, metal, or other foreign object).

We are all generally familiar with the dramatic growth in the field of product liability and its affect on the product manufacturer in recent years.

The causes of the dramatic growth in product liability have been the subject of a number of studies including an excellent report by the Interagency Task Force in Product Liability chaired by the Department of Commerce.

That report concluded that there were three major growth causes in the personal injury and property damage category of product liability:

1. Liability insurance rate-making;
2. Design and manufacturing practices; and
3. The tort litigation system.

The causative effect of these three major causes are aggravated by other contributing causes such as inflation, product misuse, improved worker awareness of legal rights against third parties and an increase in the number and complexity of products in the market place.

LIABILITY INSURANCE RATE-MAKING

The rate-making aspects of insurance coverage of product liability is a complex subject matter and for purposes of this hearing it would appear sufficient to summarize the Inter Agency Task Force Final Report as indicating a split in the opinion of various experts as to why premiums covering product liability have escalated so dramatically.

Some experts believe changes must be made within the Insuracne system for establishing accurate loss experience data in order to establish appropriate rates for product liability coverage. Others believe that the rates for product liability simply reflect the problems stemming from the underlying tort litigation system and from the design and manufacturing efforts required to manufacture more complex products.

Whichever is the correct position (perhaps it is a combination of both), the cost for such premiums or self Insurance must be factored into the price of the product whether the customer is a commercial or Government buyer.

DESIGN AND MANUFACTURING PRACTICES

The legal basis for every product liability suit for personal injury or property damage is an allegation by the plaintiff that some manufacturer (or another seller in the chain of distribution of goods) put into the marketplace an unsafe and defective product.

Some of the causes exposing manufacturers to product liability risk include the failure to properly perform one or more of the following functions: Design and engineering; manufacture—including the choice of materials, component parts and standards of workmanship; testing; installation and servicing; instructions and warnings; sales and advertising.

In addition to the foregoing, courts have also criticized the failure on the part of the manufacturer to assess the public's reasonable expectation of the product's performance from a safety standpoint; the likelihood and probable seriousness of injury; the obviousness or nonobviousness of the hazards; the elimination of risk without impairing the performance of the product and the customer's willingness to pay a higher price for a safer product.

The following factors have increased the burden placed on the manufacturer to perform properly the indicated functions: The degree of technical sophistication and innovation of the product; the inability of the user to examine the product due to merchandising and packaging techniques; the "hyping" of the product with mass advertising. Certainly, even the reasonable performance of the design, manufacture, labeling and warning functions have been negated by extravagant and uncalled for advertising and other sales pitches.

THE TORT SYSTEM

Through the years there has been noticeable shift in favor of plaintiffs bringing product liability claims against manufacturers. In the not too distant past, such suits would normally founder due primarily to the then need for establishing privity of contract between the plaintiff and the manufacturer together with the need to prove negligence in the design and manufacture of the product. Since few manufacturers sold directly to the user, privity was a formidable requirement which seldom existed with respect to the user.

The privity requirement has been substantially eliminated both by case law and statute especially for consumer users. Additionally, the so-called "long arm" statutes now make it relatively easy to sue a manufacturer in the user's home state even if this manufacturer is located in a distant state.

Moreover, the requirement for providing negligence, particularly as it related to a complex product, was not an easy assignment. Gradually, the law developed whereby liability would be imposed in some cases by presuming negligence sometimes with the aid of res ipsa loquitur. In the 1960's, the Restatement of Torts promulgated a special liability for selling a product in a defective condition which was unreasonably dangerous to the user or consumer or to his property.

The justification for establishing such special liability was based upon a socio-economic consideration, i.e., that the burden of loss caused by such a defective product is best borne by those responsible for manufacturing or selling the product

since such parties can include in their costs any necessary liability to cover such risks. This is sometimes referred to as a "deep pocket" theory.

This concept has expanded via court decisions to the extent that there no longer appears to be a requirement to demonstrate that the product is unreasonably dangerous. This enlarged concept is sometimes referred to as the doctrine of "strict liability" and may be summarized by stating that the defendant's negligent act or omission is not required to be the proven cause of the personal injury (including death) or property damage but rather, it is only necessary that the plaintiff prove that the product is defective when it leaves the defendant's control and there after causes the injury or property damage.

At times this doctrine of "strict liability" is referred to as "absolute liability" or "liability without fault." However, despite the increasing success of product liability plaintiffs which makes it appear to be so, the doctrine does not stretch that far.

The elimination of the requirement of privity of contract and the lessening of burden of proof to be sustained by the plaintiff, are accompanied by other complicating factors in the field of product liability impacting the manufacturer, such as the absence of a cut off date in many jurisdictions beyond which the manufacturer is no longer subject to liability for a product-related injury. With certain exceptions, most statute of limitations begin to run when the plaintiff has been injured and not at the time the product was manufactured or put into the marketplace. While the Uniform Commercial Code measures the contract statute of limitations from the date of delivery of the product, certain states refuse to apply that measuring event to so-called "strict liability" cases. In such cases, the statute limitations is meausred from the date of injury. This has produced seeming anomalous product liability cases involving manufacturers of 30-and 40-year-old products.

Other cases appear to indicate that manufacturers are responsible for designing, manufacturing and testing their products not only for their intended use but for any use which might be broadly anticipated. Or to put it another way, some courts have held that the manufacturer should have forescen reasonable misuse of the product. Additionally, products which have optional safety equipment may, indeed, lock the manufacturer into the position of having sold an unsafe product if it does not contain such features.

Cases involving product liability have not only stretched the entitlement theories to the ultimate but have similarly revolutionized the standards and scope of damages which can be recovered in strict liability cases to include economic loss.

THE UNIQUE ROLE OF THE GOVERNMENT CONTRACTOR

The Government contractor is typically obligated to perform its contract in compliance with a myriad of drawings, designs and specifications governing such matters as the choice of materials as well as the product's size, weight, form, fit, function and mechanical and electrical characteristics. The so-called family tree of specifications may be voluminous almost beyond belief.

The Government contractor must adhere to these contract requirements and, indeed, is subject to unilateral changes in such requirements ordered by the Government through his Contracting Officer. In most commercial settings, changes of a unilateral nature by the buyer are simply not permitted by the seller but are, indeed, made subject to the seller's approval.

In many cases, the Government contractor furnishes a custom type complex product with which the contractor has no prior experience and which will be operated and maintained by Government personnel. Complex products in a commercial setting are normally maintained by manufacturer personnel or third parties trained by manufacturer personnel.

Additionally, the use to which the product supplied by a Government contractor is put by its very nature creates risks to which a similar product in a commercial setting would not be subjected, e.g., computers and displays which are used in en route and in terminal surveillance of aircraft for Government civilian and military purposes versus the use of similar equipments for air reservations systems.

The application of the "strict liability" theory to a Government contractor operating under the constraints inherent in performing a Government contract places such contractor in an unfair or unreasonable position absent Government indemnification of the type contemplated by H.R. 5351.

The unfair position in which the Government contractor finds itself from a product liability standpoint is aggravated by the sovereign imminity doctrine

in which the Government can only be sued where it has given its consent to be sued.

This sovereign immunity doctrine virtually guarantees that the Government contractor (and involved subcontractors of all tiers) will be the primary defeudants(s) in any product liability litigation involving a product delivered to the Government.

The Government of the United States have given its consent to be sued in very limited situations such as under the Federal Tort Claim Act, the suits in Admiralty Act, the Public Vessels Act and under a few other statutes not pertinent to these hearings.

It should be noted that while the doctrine of "strict liability" has been enlarged to the detriment of the product manufacturer, the doctrine has not been carried over into litigation arising under the Federal Tort Claims Act, even for so-called extrahazardous activities. The Federal Tort Claims Act precludes imposition of liability unless there has been negligence or some form of nonfeasance or misfeance on the part of Government employees. (*Laird* v. *Nelms*, 406 U.S. 797)

This requirement for proving negligence in cases brought under the Federal Tort Claims Act, in turn, causes many plaintiffs, in complicated cases, to pursue a Government contractor under a "strict liability" theory rather than the Government itself when the injury can be associated with a product or service supplied to the Government.

The manufacturer, as a supplier of military products to the Government, comes under still another disability in the tort field. While members of the Armed Services of the United States cannot sue the Government, such persons, of course, can sue the manufacturer under a product liability theory. Aggravating this disability, the Supreme Court recently affirmed in the case of *Stencil Aero Engineering Corporation* v. *U.S.* that the manufacturer has no rights over against the Government even in situations where the Government furnished the design and specifications to which the offending product was manufactured.

Congress has evaluated the issue of Government contractor indemnification from time to time but except for two scattered pieces of legislation, no relief has been forthcoming.

In 10 USC 2354 (implemented by the ASPR and later the DAR), indemnification is provided defense contractors against unusually hazardous risks under research and development contracts, both cost reimbursement and fixed price. This indemnification protects against claims by third parties for injuries, death or property damage to the extent arising out of direct performance of the particular contract and from a risk defined in the contract as being unusually hazardous. Actions or omissions by the contractor amounting to willful misconduct or lack of good faith are excluded from coverage. Similarly, this statutory indemnification covers injuries, death and damage to the contractor's employees and property, as well as damage to Government property.

This protection can be extended to subcontractors with the prior approval of the Contracting Officer with the prime contractor indemnifying the subcontractor and the Government, in turn, indemnifying the prime for the prime's liability to the subcontractor.

Under Public Law 85-804 (50 USC 1431-1435) (implemented by the ASPR and later the DAR), a contractor for any agency (including a number of the so-called civilian agencies of the Government), which agency exercises functions in connection with the national defense may be indemnified against unusually hazardous risks and nuclear risks not considered unusually hazardous under other than research and development contracts. The coverage is subject to the same conditions stated above for 10 USC 2354. Again, the flowdown to subcontractors of all tiers is permitted with the approval of the Contracting Officer under the conditions indicated.

These indemnification provisions require the contractor to exhaust his own insurance coverage prior to the indemnification becoming operative.

In addition to the two statutes providing for indemnification of Government contractors, there is a straightforward reimbursement provision for use in cost-reimbursement type contracts which has been in ASPR and DAR for years. This provision entitled, Insurance—Liability to Third Persons, provides reimbursement to the prime contractor for liabilities to third persons for death, bodily injury or property damage not compensated by insurance arising out of the performance of the contract, whether or not caused by negligence of the prime contractor, unless otherwise provided in the contract or unless caused by willful misconduct or lack of good faith on the part of the prime contractor. There is no comparable clause for fixed-price contracts.

With respect to the statutes and implementing clauses authorizing indemnification, the term "unusually hazardous" seems most frequently used by the Government to describe activities which pose substantial danger that some injury will result despite the exercise of utmost care. Generally, the Government, when requested to indemnify a contractor under either of these statutes, tends to confine its thinking to the risk areas involving space vehicles; transportation of rocket fuels and other highly explosive, incendiary and toxic fuels; missiles and nuclear materials.

From a contractor's standpoint, it would be most helpful if the term "unusually hazardous" were to be interpreted to include activities which are dangerous in the sense that even though the happening of an accident is improbable or unlikely to occur, it would, nonetheless, be catastrophic from the scope of a resultant injury standpoint, if it did occur, e.g., the use of air traffic control systems for en route surveillance, expecially over congested areas.

In the event of a catastrophic accident in either category arising out of the performance of a Government contract, the ultimate liability of either the Government or the contractor can be rather uncertain.

It is obvious that third persons would sue the Government as well as all of the contractors and subcontractors involved with the system or equipment claimed to have been responsible for the catastrophe. Liability, however, if any, on the part of the Government would have to be based upon the Federal Tort Claims Act since the operation of the doctrine of sovereign immunity, whereby the Government can only be sued where it has given permission to be sued, would prohibit any other basis for suit.

A shortcoming of the Federal Tort Claims Act as previously noted is that unless the injured or damaged third party can demonstrate that a Government employee was negligent and that such negligence caused the injury or damage, the Government cannot be held liable. The fact that a Government contractor had negligently manufactured the article which caused the injury or damage will not establish a basis for recovery against the Government. Furthermore, even if fault or negligence can be traced to Government personnel (in a *Stencel*-type setting), the Federal Tort Claims Act, nonetheless, exempts the Government from liability if the Government was exercising a "discretionary function." There are many matters which may fall within that exclusion based upon implementation of national programs involving national defense, safety, health and other related factors. Finally, the Federal Tort Claims Act appears to require proof of fault or negligence on the part of the Government employee even in situations where fault without negligence would be imposed on private citizens.

As a result of these limitations of the Federal Tort Claims Act, the Government may well be insulated from liability, thus making it more likely that the injured third party would seek recovery from the contractor involved. Liability on the part of prime contractors, subcontractors of all tiers and suppliers may be traceable to one or more of them by virtue of a faulty design or defects in material and workmanship—perhaps confined to a small component which is insignificant from a dollar-value standpoint. Whether the catastrophe occurs either during the period of performance of the contract or at a later point in time as a result of the performance of the contract, there is, of course, no way for a Government contractor to limits its liability to third persons.

If the injuries are sustained by those persons serving in the Armed Forces of the United States, then the likelihood of suit against either the Government prime or subcontractor, or both, becomes more probable since suits against the Government itself would be foreclosed as a matter of law.

Suits by foreign nationals against the U.S. Government are even more difficult to maintain successfully since the Federal Tort Claims Act excludes claims arising in a foreign country. Neither can the U.S. Government be sued against its will in a foreign country by nationals of that country.

Suits are possible by foreign governments on behalf of its citizens against the U.S. Government in the International Court of Justice or before a commission established after diplomatic consultations.

In the area of liability by the contractor for his product, there has been a trend away from the need for proving negligence on the part of the manufacturer towards imposing liability irrespective of lack of proof of negligence, i.e., liability without fault. This principle would apply not only at the prime coutractor level but to any subcontractor or vendor supplying an improperly made component.

Certainly, many of the products supplied by a Government contractor could be classified as a product to which would attach the principle of liability without fault. The law is still developing in this area and will vary from state to state but the trend is unmistakably there.

From the general public's standpoint, it should be noted that in the absence of the theory of liability without fault, there otherwise would be great difficulty in some cases providing that a contractor had been negligent. This is particularly true if the cause of the catastrophe is itself destroyed by the castastrophe or is unavailable to the parties for analysis and examination because of military security requirements.

Absent indemnification by the Government, insurance coverage may well be inadequate in some cases due to economic realities. Thisjsituation might create the anomaly of liability to third parties in amounts that could bankrupt the contractor and yet leave large portions of the losses of third parties uncompensated due substantially to the insulated position of the Government from liability to such third parties.

The existing indemnification statutes have serious shortcomings in that Public Law 85–804 is limited to agencies which exercise functions in connection with the national defense and while a number of so-called civilian agencies are listed, the Government tends to take a narrow view of what risks constitute "unusually hazardous risks." Additionally, 10 USC 2341 applies only to research and development contracts of the defense establishment, i.e., it does not apply at all to production contracts nor to any type of contracts of nondefense agencies involving activities which are equally or more hazardous than many defense activities.

Thus, contractors are now substantially exposed to many potentially staggering liabilities with no adequate means of financially protecting themselves while at the same time the public has no assurance of receiving adequate compensation upon the occurrence of such a catastrophic accident.

Quite apart from the need to indemnify against a catastrophic type of accident, the *Stencel* case ought to be instructional in the fairness of the proposition of indemnification by the Government when the Government contractor or subcontractor has furnished a product or rendered a service which complies with the contract specifications.

While we support H.R. 5351, NSIA would like to suggest some changes in wording which we believe will clarify the meaning of the bill, remove some ambiguities and help to make the bill more workable on a practical basis.

We suggest that Section 4(a) of the bill be revised to read as follows:

"The United States Government shall indemnify and hold harmless the supplier and his insurers for any loss experienced by a supplier of a product or service to the United States Government if the injury-casing aspect of the product or service was, at the time of delivery of the product or acceptance of the service, in compliance with the contract specification pursuant to which the product was supplied or the service rendered."

This revised text for Section 4(a) is intended to make clear the intent that the Government Contractor is to be indemnified by the Government in all cases where the contractor complies with the requirements of his contract. The contractor would not be indemnified in those cases where the injury-causing aspect of the product or service was found to have resulted from a breach of the requirements of the contract. We have departed from the original text of Section 4(a) and have deleted therefrom the criterion for indemnification based on the imposition of a Government specification.

Inasmuch as who, when and how a specification may be "imposed" in a Government contract is very frequently a problematical and debatable issue, we have concluded that a better test would be whether or not the contractor met the requirements of his contract or was in breach thereof.

In this revised language, we have deleted the final phrase of the existing Section 4(a) "or unless such supplier has expressly contracted not to be so indemnified." We have made this deletion in order not to encourage a practice on the part of contracting officers to require an agreement not to be indemnified as a condition precedent to the award of a contract. Without this deletion, we believe that such a practice would develop and, thus, defeat the overall purpose of this statute.

Our revised language also provides for indemnification of a supplier's insurers, since we think it would be inconsistent with the overall intent of this legislation not to indemnify the contractor's insurers. Here again, if the contractor's insurance protection can be used to offset the governmental indemnification provided by this legislation, we can foresee a practice developing wherein contracting agencies established requirements for insurance, thus frustrating the intent and purpose of this legislation.

In concluding this formal statement of NSIA, we would like to applaud the efforts of the Subcommittee for their timely consideration of this needed legislation. We endorse this initiative and encourage early enactment. If the Association can be of further assistance to the Subcommittee or its staff, we trust that you will not hesitate to call on us.

Mr. GEAGHAN. First of all I am here representing NSIA. It is as you probably know an association, a nonpolitical association of about 280 American industrial research and educational organizations.

Mr. DANIELSON. Sir, would you excuse me for a moment. Couns l has just reminded me that Mr. Fred Israel, vice president of Stencel Aero Engineering is present, and I understand he is a member of your group; is that correct?

Mr. GEAGHAN. I am not sure.

Mr. DANIELSON. I thought if you were representing the same people you might as well both be there, but since I am wrong, you just proceed.

Mr. GEAGHAN. Fine, sir.

First of all I would like to make clear that I am here authorized at least to make an appearance for NSIA only in connection with H.R. 5351, which is the general subject matter I felt necessary to indicate the limits of my authority.

Mr. DANIELSON. Do not worry about that. We exceed our own authority most of the time. We will accept that responsibility.

Mr. GEAGHAN. Fine. We believe at NSIA, in talking with very many government contractors, in general that this is a long overdue piece of legislation that is badly needed, to correct situations such as the *Stencel* case, and while the government contractor is in a very unique-type situation, it seems appropriate to at least touch briefly on the explosion that has taken place in the field of product liability in general, and I have indicated some of the reasons for this dramatic increase in litigation in the product liability field and the dramatic increase that goes along with that with respect to insurance premiums covering this type of risk from a manufacturer's standpoint.

Particularly noticeable I think has been the increase with respect to aircraft products, and that really is a very broad field all by itself. It covers planes, it covers missiles, it covers various components that go into both of those kinds of equipments. It covers the electronics that are carried aboard missiles and aircraft and indeed it touches and embraces equipment that is located on the ground, that is involved in the navigation of missiles and aircraft, and of course that would include things such as the FAA control radars that guide the en route destinations of planes as well as aircraft coming into major terminals within the United States and foreign countries, so that aircraft products in general probably have experienced the greatest growth as far as increases in premiums are concerned.

The product liability field itself has completely exploded in the sense that it was not that many years ago that when people talked about product liability they talked basically about food and drink for human consumption, and the cases that involved the foreign objects and the various soft drinks and in other processed-type foods. We have gone far beyond that now into all sorts of equipment, and as equipment and products become more complex, there has been more and more litigation involving such products.

I think one of the better studies that I have read, and I refer to it in my written material, was the report that was done by the Interagency Task Force on Product Liability. It was chaired by the Department of Commerce, and it really traced the increase in product liability to basically three factors, not necessarily in the order of their

importance. There would be insurance ratemaking procedures, the complexity of the product itself, and finally the third thing would be the tort litigation system itself.

Now with respect to insurance ratemaking that has caused at least from the Interagency's conclusion in their final report, the ratemaking process itself is subject to a great deal of criticism. For example, insurance companies typically write insurance policies on product liability on a claims-incurred basis. What that means, as you probably well know, is that it has nothing to do with which insurance company covers the manufacturer when the product is manufactured or assembled, but rather it is when the claim surfaces through the injury or property damage caused by the particular product, so that with changes in insurance companies it is very difficult to keep track of the actual historical factors that contributed to rate increases. If it were tied perhaps to the year the product were manufactured, it might be somewhat better, more easy to do this.

Secondly, the Interagency Task Force report criticized the method of logging claims having to do with excess funds in accounts that are labeled incurred but not reported, in other amounts set forth in annual claims that have been incurred but not paid, and it really is a situation where the insurance companies were criticized for not really being able to support the dramatic increase in insurance premiums over the years. I am simply touching on that to indicate that that is one of the complicating factors in this particular product liability explosion.

Secondly, the complexity of the products themselves, having to do with the selection of materials, the way they are packaged, which prevents examination by the users, the hyping that takes place in commercial settings through advertising, et cetera. That is a complicating factor.

Third, the tort system itself, in which there are really no uniform statute of limitations, so that you have the anomaly of manufacturers making a product and being held liable some 30 or 40 years later, because the statute of limitations does not begin to tick in most States until an injury occurs, which may be 20, 30, or 40 years after a product has been manufactured. There have been some efforts to address this I think in uniform product liability acts, and in the interagency task force report there was a conclusion which surprised me in the sense that apparently 50 percent roughly of all total insurance payments for product liability claims really had to do with employees who were injured in the workplace, so that obviously they cannot sue their employer, it is covered by workmen's compensation, and there is probably a similar case with respect to Federal employees under the FELA, so that 50 percent of all product liability insurance payments according to this interagency report had to do with injuries in the workplace.

Thirty percent of those kinds of claims had to do with at least evidence of some negligence on the part of the employer, for example, machinery in which the safeguard were not maintained properly, or in which the equipment itself was not maintained.

Now we get to the Government contract, which presents a very unique-type situation, because first of all the Government contractor is obligated to perform the contract in accordance with a myriad of specifications and drawings, which in any kind of a complex piece of gear the specifications might well fill a large portion of this room.

There are efforts under way to reduce that kind of detailed specifications, but right now you have a situation where the Government contractor has no choice. He must make the product as it is designed and specified by the Government.

Second, the Government uniquely has a unilateral right to make changes in the designs and specifications, whereas in the commercial setting most typically the manufacturer would not permit a customer to make unilateral changes, but rather would demand that the changes be approved by the manufacturer itself.

Mr. MOORHEAD. Could I ask a question that might help me understand this a little better?

Mr. GEAGHAN. Yes.

Mr. MOORHEAD. If the manufacturer was exactly following the specifications that the Government provided, and he did that without negligence, wouldn't his lack of negligence be a defense in any suit that was brought?

Mr. GEAGHAN. No; it would not, unfortunately. It would not. It is like complying with standards that exist, whether it is the ANSI standards, which are voluntary-type standards, or any other well-accepted standards of engineering in the field. It may help to mitigate, may help to mitigate damages in the eyes of the jury, but it is no defense of indeed the product itself is defective, so that what you have in this whole tort liability system, one of the three factors we mentioned, is the strict-liability theory, that if a product causes an injury, it matters not how careful the manufacturer was. He could have the most unique and the most thorough quality control system devised, but nonetheless if the one product, maybe it is one out of thousands, nonetheless if that gets out and human beings being human beings there will be mistakes, there is liability.

Mr. MOORHEAD. It would seem to me there should be a difference between working for the Government and working for someone else in the manufacture of a product. I can see instances where the Government might not want to be made the defendant. But when someone, expressly for military equipment, is following the specific requirements, I think we need to change the law and alleviate liability, rather than just allowing the interpleading of the Government.

Mr. MCCLORY. Will the gentleman yield?

Mr. MOORHEAD. Yes.

Mr. MCCLORY. I do not think the witness was responsive to the question. That is the reason I asked to intervene. It is not a question of quality control. It is a question of whether or not the product was manufactured consistent with the Government specifications, not that there was some defect or some deficiency in the manufacture. I do not think the example of the American National Standards Institute and the Government specifications is a good analogy either, because you have got a private agency on the one hand, and you have got the Government involved on the other.

I might say that in my district I have Johns-Manville, and Johns-Manville has used asbestos extensively. They did produce products using asbestos, and did it according to specifications, and did it in compliance with the Government standards, and they did not do anything negligent. Do you not think that there ought to be a defense on the part of the company, having so complied? They did not make any mistakes. They did not do it wrong. They did not omit anything.

They did everything in compliance with the specifications, the way they thought it was supposed to be done. Do you not think it should be a defense then that they complied with those, and that at least they should not be the ones liable? If there is a liability it should be on the part of the agency of the Government that developed and promulgated the standards.

Mr. GEAGHAN. In answer to your question, let me try a little bit better in my answer. What I was trying to indicate was that the Federal Government itself is not liable as the designator, if you will, of how the product would be manufactured. Because of the Federal Tort Claims Act it has only given its permission to be sued in limited situations. That leaves the contractor exposed as the person to whom the litigation would be addressed, since they indeed made the product, whether it is asbestos or any other kind of particular requirement, and the law as between the injured person and the manufacturer is that of strict liability, and it will not matter that it adhered to some specifications developed by the Government in this kind of a setting, so that the bill, this kind of legislation, is needed to indemnify the manufacturer for having followed the Government's directions. I do not know whether that makes it any clearer or not.

The only reason I mentioned the ANSI-type standards, and I agree that is a voluntary-type standard so it is not the same, but I was just trying to indicate no matter how careful you are even in a commercial setting, that if somebody is injured the law as it is developed presents a theory of strict liability. It is almost described as no fault.

Mr. MOORHEAD. That almost places the manufacturers, though, in a position where they have a right to second guess the Government as to whether a product that it has ordered should be produced.

Mr. GEAGHAN. If there is indemnification, you mean?

Mr. MOORHEAD. That is right.

Mr. DANIELSON. Gentlemen, I am going to request that we permit the gentleman to conclude his statement and then ask questions. We could not commence our hearing today until 10:30 due to lack of a quorum. We have four witnesses, and we just simply will not be able to entertain them all. We will get into the questions, but I think that in order to have a proceeding that will accommodate the witnesses, we will just have to let you conclude your presentation and then we will take you on.

Mr. GEAGHAN. Fine. Thank you very much.

One of the other unique situations involving a Government contractor is the use to which the product is put. For example, there are certain commercial products which are designed to perform certain functions, whether they are computers or displays or any kind of equipment that is designed to work with computers. Now it is one thing to use those kinds of products commercially to keep track of things such as payrolls, accounts, financial information, that type of thing. However, generally the same kind of equipment could be used in connection with FAA activities. For example, many of the displays which the air traffic controllers use are driven by computers and by all sorts of commercial equipment, and they may be modified, that is true, but the use to which the product is put is kind of unique from the standpoint of Government contractors, too.

Then, as I mentioned previously, if you were in a commercial setting, and the customer required you to make a product in a certain way, that customer would come under a litigation attack if you will by anyone that was injured, that had his property damaged, whereas when the Federal Government issues specifications and drawings which must be followed in performing a contract the sovereign immunity has very strict features which prevent people from suing, injured people from suing the Federal Government itself, unless there has been actual negligence on the part of the Government employee, and there is where it differs from the commercial setting.

Commercial setting is such as indicated that with a strict liability, you do not have to prove negligence. You do have to show that there was a defect in a product, but no matter how carefully you made it, if there is a defect and it causes damage or personal injury, you will be liable.

Not so with the Federal Government. If you are an injured plaintiff, you must show under the Federal tort claims some negligence on the part of the Government, and that does not include negligence by the Government contractor itself.

You have another disability from the stand point of uniformed personnel who are injured in performing their duties. It they are using equipment they again cannot sue the Federal Government, and this is one of the situations brought about in the *Stencel* case. That was a uniformed personnel, and I am sure Mr. Israel can comment on that particular case at length, and I will not dwell on it.

The present situation involving indemnification of government contractors is restricted to two laws as far as I can determine. One is 10 U.S.C. 2354, which allows indemnification on Government contractors performing research and development type work, but this is confined again to unusually hazardous risks. Under Public Law 85–804 there is an indemnification.

Mr. DANIELSON. Where is that in the code?

Mr. GEAGHAN. That is 50 U.S.C. 1431 to 1435.

Mr. DANIELSON. Thank you.

Mr. GEAGHAN. Again this applies to unusually hazardous risks and nuclear risks which are not considered unusually hazardous. There is the ability to indemnify a Government contractor under that particular legislation. However, it has been the experience of most contractors that it is extremely difficult to obtain indemnification provisions under that particular statutory authority, because it is confined to unusually hazardous risks, and again there are situations which are not unusually hazardous, but they would be catastrophic if they did occur. Maybe the probability of their happening is not great, and because of the restriction of that Public Law 85–804 to certain civilian agencies, and only those that perform a function in connection with the national defense, I think this would rule out a lot of the governmental agencies.

Basically there is a need for legislation such as Stencel. To me it represents a fair solution that if a Government contractor does indeed follow the detailed specifications of his contract, that if there is an injury to a person, including death or property damage, that the Government contractor ought to be indemnified.

Another shortcoming of the Federal Tort Claims Act has to do with the fact that that act excludes claims arising in a foreign country, even if it arises out of a product delivered to the U.S. Government. H.R. 5351 has addressed that particular problem, I believe, in section 3, by indicating that products which are supplied to a foreign government either under foreign military sales or by virtue of foreign aid will be considered to be a product supplied to the U.S. Government.

We have proposed a change in section 4(a) of the bill, and that is due to the fact that we believe it is a very murky issue, if language such as imposition of a specification by the Government is utilized, because in many cases the contractor is asked for suggestions as to how a particular design ought to be carried out, and whether some participation versus a lot of participation would create indemnification if the language presently in the bill is used versus the language which we suggest, which is that if the product or the service is in compliance with the contract specifications at the time the product is delivered or the service accepted, that that ought to be the criterion for indemnification.

I think in the interest of time, and I have tried to cover most of the issues in my written statement, I will end there. If there are any questions, I will be glad to try to answer them.

Mr. DANIELSON. Thank you, Mr. Geaghan. You have opened the subject anyway very, very effectively in my opinion. I would like to make one little preliminary statement, that some of you who are here and who are not familiar with how the Congress works may not fully understand unless I do make the comment.

We are now in the 21st day of July of 1980, and under our constitutional system of government, the Congress has to be reelected each 2 years. The election will be in November. It necessarily follows that the Congress will want to adjourn on or about the 1st of October, and whether you concur in that statement or not, I can tell you as a matter of fact that we will adjourn on or about the 1st of October.

Meanwhile, there has to be a 2-week interlude to permit the architecture of democracy properly to function, sometimes known as the Democratic National Convention, and we will take off Labor Day, so that I, without diminishing the importance of this legislation, feel constrained to state that I do not see how it will be possible legislatively to handle this subject, to put it through this subcommittee, the full committee, the House of Representatives, the counterparts in the other body, and submit it to a harried President, who also is running for reelection, for his consideration, and have that done by the 1st of October.

I think it is essential to state this, because some people may get the opinion that we are going to have a new law this year. I do not think it is possible. However, your presentation has been excellent, and you set out the paramcters of the problem pretty well. I see them as being very complex, having far-reaching effects no matter what we do, and I think it is high time we get started on this subject, because God and the voters willing, most of us will be back next year, and we can start off with the benefit of the hearings from this year. That is enough of a preliminary.

I have only a couple of questions that I will bring up. I get the feeling that what we are really talking about here is an amendment to the Federal Tort Claims Act, whether it is designated as that or

not. That is what you are really talking about, to put ultimate tort liability on the Government for damages sustained by an innocent person as a result of a product manufactured according to Government specifications. That liability may be shared under some situations by both the Government and the manufacturer, and there may be others in which the specifications tend to exculpate the manufacturer, and would harness the liability strictly on the Government itself. That is a far-reaching theory. It may be a good one. I am not disparaging it at all, but I think it is a very delicate problem into which we are treading, and we must move very carefully.

I am going to yield first to my collengue, the ranking Republican member, Mr. Moorhead of California, with the admonition that he try to follow the 5-minute rule.

Mr. MOORHEAD. I will not be too long.

Section 4 contains language whereby a supplier can waive the indemnification right granted in this bill. Would this not in essence encourage the Government to force the bidder to accept the waiver clause as a tradeoff for getting his contract?

Mr. GEAGHAN. We had contemplated that that could well happen, and in our written presentation have suggested that that be removed from the particular bill, because I think that it would be used really as a lever in many cases by the Government to obtain the Government contractor's permission to waive indemnification right as a condition of obtaining the procurement.

Mr. MOORHEAD. If a private citizen, whether he is nonmilitary or non-Federal employee, is injured, sues, and recovers against the supplier contractor, the supplier contractor can now seek indemnification against the United States; is that correct?

Mr. GEAGHAN. Under the proposed legislation, that is correct. It is not correct without the legislation.

Mr. MOORHEAD. You think he cannot at the present time?

Mr. GEAGHAN. That is correct. That is my feeling. He may sue the Federal Government directly, but I do not know of any indemnification which would be permitted short of something that is in a contract that exists between the manufacturer and the Government.

Mr. MOORHEAD. I was thinking about that *Stencel Aero* case, where it went off on the fact that he was a member of the National Guard. This seems to be an area where there is a little bit of dispute. We are going to have to do a little research on this thing.

Mr. GEAGHAN. Yes.

Mr. MOORHEAD. Are Government specifications ever negotiated with the supplier?

Mr. GEAGHAN. I would say very definitely that they are.

Mr. MOORHEAD. If they were, would not the contractor waive his rights under this bill, if he were actually negotiating with the Government on those specifications, so that actually they had some input?

Mr. GEAGHAN. I think it would depend, and I will try to address the situation—first of all, suppose that there were negotiation of specifications, and that the contractor had really insisted, if that is possible, because of the unique position the contractor had technologically speaking, insisted on a particular change to a specification. If that particular changed specification was the only cause of the accident, I could see that that would be a problem, first of all as the bill is presently written and, secondly, even as it is possibly revised.

Mr. MOORHEAD. Except for the fact that as you change one thing sometimes it has effects on other things.

Mr. GEAGHAN. It can cause a rippling effect through a whole family of specifications, and it becomes a very difficult problem to assess what actually caused the problem, because suppose it is a catastrophic-type accident where the vehicle, the equipment or whatever is destroyed. It is going to be very difficult to pinpoint what indeed did cause it. It is a matter judgment. It is a matter of conjecture, a matter of expert-type testimony, basically.

Mr. MOORHEAD. I want to thank you very much for your testimony.

Mr. DANIELSON. Mr. Harris of Virginia.

Mr. HARRIS. Thank you, Mr. Chairman.

I would like to explore with you, if I may, cases where the contractor does in fact under contract have the specifications, and a third-party may have written the specifications. This is not uncommon. I think it is often very common with respect to many contracts. In legislation like this, do we idemnify all parties and say Uncle Sam picks up the bill no matter who was at fault?

Mr. GREGHAN. As I read the legislation, it seemed to me to be confined to the manufacturer of the product. At least that is the way I recall the bill was written. It is a very good point too from the standpoint that there could be, and I cannot say there is, but it strikes me that there could well be savings to the Government in acting as a self-insurer on product liability, much like the Government does with respect to the property it owns. It is typically a self-insurer on Government property including facilities, because you have repeated through the whole chain of prime and subcontracts situation each of those companies insuring against a potential liability in performing that particular Government contract.

Now if the Government acted as a self-insurer, it would cut out those premiums all the way up the line through the various tiers of subs right up into the prime contractor, and it really addressed to the question you asked.

Mr. HARRIS. It would also cut out a certain amount of discipline, too, would it not?

Mr. GEAGHAN. It might. I think there is a lot of discipine in the manufacturer now. For example, OSHA, in the workplace of a manufacturer. It is subject to the act, all sorts of Federal liability. In the consumer are there is a different set of disciplines, but I think if you cut out the discipline, what would happen is the contractor would be more likely to broach his contract, and this bill, as I read it, would not cover a situation where the contractor did not follow the designs and drawings. If he fell short on anything he is not idemnified. At least that is the way I read the bill, so I think that is a built-in-type discipline to follow.

Mr. HARRIS. No. Suppose I have got a guy here, in just very simple terms, who has taken a development contract, has messed up on the specifications, and them proceeds to get the contractor to manufacture the product, and where he messed up proves the basis for liability. Are we passing a bill that says to this fellow that even though he has clearly been negligent with respect to the development of this product, that he is not going to be subject to liability?

Mr. GREGHAN. He is the one that originally designed it?

Mr. HARRIS. Yes.

Mr. GEAGHAN. And how he is building it.

Mr. HARRIS. Yes.

Mr. GEAGHAN. I do not believe so. The reason I say that, it is like a provision that one party will assume liability say for the storage of certain goods, and if that is all it says, the party that is doing the storing should not be able to get off and does not get off the hook if he is careless about the way he does it. I think, in other words, it really still would be a fault that would be traceable back to the manufacturer, even if he turns out to be the builder of the product in the final analysis. I do not think indemnification would reach that kind of a situation, where he would gain by being protected indemnitywise in this kind of legislation.

Mr. HARRIS. I have here in section 4(a), the U.S. Government:

> Shall be liable as indemniture for any loss experieneed by a supplier of a product to the United States Government beeause of the supplier's liability arising from the eharaeteristie of the produets supplied to the United States Government for the supplying of sueh produet if sueh eharaeteristie was required of that supplier by the specifications for the produet imposed by the United States Government unless such supplier has expressly contraeted not to be so indemnified.

Mr. GEAGHAN. I think in your setting it raises the question about imposed by the United States. Yes, in the final analysis it was, but I think it is the type of provision that would not be enforced by a court if it could be finally traced to the original designer who is also the builder. I just do not think it would happen.

Mr. HARRIS. Mr. Chairman, I am going to suspend here, but I wanted to share with the subcommittee my experiences investigating contracting out by the Federal Government. You have the contractor, a contractor drawing up the specifications. You have a contractor oftentimes evaluating the specifications. You have the contractor doing the contracting. And then you have the contract files being contracted out to a contractor. And when we deal with language like this that says that regardless in this chain of where the liability is, there is an indemnifier, namely Uncle Sam, you have really opened up a very serious question.

Mr. DANIELSON. Thank you, Mr. Harris.

Mr. McClory of Illinois.

Mr. MCCLORY. Thank you, Mr. Chairman.

Then you also have the situation that the contractor designs a product and then discusses it with the Government agency, with the idea that the Government agency will approve and specify the product according to those standards. But then changes are made by the Government, so that the ultimate decision is not the decision of the private company, but it is the decision of the Government agency. So, therefore, it seems to me that we do have justification for this kind of legislation.

I might say that with respect to the Stencel case, as I read it, the company urged upon the Government to make certain changes. But the Government declined to make those changes, and then as a result of that this accident happened. Yet liability was imposed on the company, notwithstanding that they would rather have done it in another and a safer way. Do I misstate?

Mr. GEAGHAN. No, that is my understanding, also, sir, of the Stencel case, that the company actually did recommend a change, but they were rebuffed. I think those things are judgment matters.

Mr. McCLORY. As a cosponsor of this legislation, I want to indicate a sympathy for the measure. However, in one part of the bill we talk about foreign governments, products supplies to foreign governments and to "factions" of foreign governments. I am a little puzzled how that happened to get into the bill. What is a "faction of a foreign government."

Mr. GEAGHAN. I suspect it may well be situations—I am not familiar with drafting the bill, but I know I have dealt with a lot of foreign governments, typically shipyards, on military-type products, and they are incorporated. They are public corporations, like a shipyard owned by the Spanish Government. This is typically true all through European companies at least. I would suspect that the faction could well apply to any subdivision, including a corporate entity that is owned by a foreign government.

Mr. McCLORY. What is the scope of the problem that we are dealing with? Of course with regard to Stencel, we are concerned about a specific case, but are there a large number of these cases pending or threatened?

Mr. GEAGHAN. That is really very difficult to put a finger on. I cannot say that there has been a flood of this type of litigation, but that may well be, because I just do not know. I think the potential is there, and I think this has concerned people as much as any other factor, along with as I say the increased premium cost that is going on. If you are doing government business, there is a tremendous amount of pressure put on the government contractors in order to hold costs down, to take a larger and larger deductible in building products for the government, so that is up into the multimillion dollars per incident. This is the kind of thing that alarms people. And at the other end, catastrophic-type-incident insurance is becoming more and more difficult to obtain for particularly aircraft products in very large amounts, so you are getting it at both ends, and so I am not sure that I can personally document anything about the frequency being a floodgate at the moment, but rather the potential is there. There may be other people that know more about that.

Mr. McCLORY. We are dealing with more than just one or two cases. We are dealing with a national problem which requires some kind of Federal legislative response.

Mr. GEAGHAN. Yes, indeed.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. McClory.

Mr. Barnes of Maryland.

Mr. BARNES. Thank you, Mr. Chairman.

I would take it, based on your last response, that you would not have any idea what we are talking about in terms of cost. I take it in the Stencel case it was $189,000. Do you have any numbers over the last few years as to how much industry has been forced to pay out they would seek to have indemnified in the future?

Mr. GEAGHAN. No, I am sorry, I do not, sir.

Mr. BARNES. I do not have any more questions of Mr. Geaghan. Thank you.

Mr. DANIELSON. Thank you, Mr. Barnes.

Mr. Geaghan, you pointed out in your response to one question that you felt that there was a positive saving in that the Government as the ultimate insurer here would make it possible for the manufacturers

to eliminate some of the product liability premium which is otherwise passed on as a part of the cost of goods provided. Would that not also inevitably spawn more specificity, more particularity in the government specifications, in that if a government agency is going to be the ultimate insurer, if the Government is the underwriter then those agencies which let the contracts must be even more specific, more particular in their specifications than they are today, because they have to be calculating against another exposure. It would seem to me that that would necessarily follow.

Mr. GEAGHAN. That could well be the case, although there are efforts elsewhere to trim the myriads of specifications that go on.

Mr. DANIELSON. We are well aware of that.

Mr. GEAGHAN. Right.

Mr. DANIELSON. This subcommittee has been working on reform of the regulatory process for nearly 2 years.

Mr. GEAGHAN. Right.

Mr. DANIELSON. I see the current flowing in two directions here. We have heard months of testimony that the Government should get out of so many regulations and get away from specificity, because it is too burdensome for industry. Now we are turning it the other way and say that the Government ought to pick up the entire tab. I heard a convention on television just last week, somebody gave a speech about the Government, it should get out of things, become less involved. It may have been a fiction, as most drama is, but nevertheless I did hear speeches to that effect just last week by prominent persons, and yet I hear comment now to the contrary, let us get the Government more deeply involved, let us be the ultimate godfather there who pays for everything.

Mr. MCCLORY. Will the gentleman yield?

Mr. DANIELSON. I will be pleased to yield.

Mr. MCCLORY. This committee has recommended a very important regulatory reform bill which is pending interminably before the full House Judiciary Committee. Could the gentleman tell us when we are going to finally act on regulatory reform and send it to the floor of the House for action in this Congress?

Mr. DANIELSON. Well, as soon as we can resolve some scheduling problems, we should be able to tell. But I hope that we will have progress in the immediate future.

Mr. MCCLORY. Will the gentleman yield further? Does the gentleman insist upon regulatory reform as the gentleman wants it or the way the majority of the committee wants it?

Mr. DANIELSON. As justice requires it. I thank the gentleman.

Mr. Geaghan, thank you for coming. You have really lifted the lid off of a huge, very complex problem. Almost every point you brought up would spawn different contingencies, different possibilities. I think it is an important subject. I am thinking of an airplane. I happen to fly quite often from here to California. It seems like I get on DC–10's all the time. They are notorious for losing engines, and I sit there with my knuckles white all the way back and forth across the country.

Now I remember that a cargo door also blew out of one of those over Paris about 6 years ago, and it was the most complete case of everybody dying I guess that has ever happened, over 300.

If the Government also built a DC–10 to use as a cargo plane for the Air Force, and in it made specifications for the cargo door, and then if the manufacturer of the airplane used those same specs for a

passenger plane which it sold to some airline, and the door blew open, under this theory, having followed the Government specifications, is the Government the ultimate insurer of all those passengers?

Mr. GEAGHAN. I would say not, because as I read the legislation, it talks about performing a Government contract.

Mr. DANIELSON. Sir, I am only talking about the theory, because no bill ever reaches the floor in the same form that it reaches this committee; as introduced. We are talking about a subject matter here. I am only thinking of the outlying second, third, fourth cushion liabilities that we may pick up. It is a great subject, and I think we have enough to do for the next 2 years.

Thank you for coming.

Mr. GEAGHAN. Thank you very much. It is a pleasure. I appreciate it.

Mr. DANIELSON. I really do appreciate your testimony. We may call upon you again. I gather that you have an office somewhere here near the District of Columbia.

Mr. GEAGHAN. I am from Massachusetts, sir. I will make myself available.

Mr. DANIELSON. We will probably call on you again, and I am sure that your employing agency will be glad to cooperate.

We now have as our next witness Mr. Fred Israel, vice president of Stencel Aero Engineering.

Mr. Israel, please come forward. You have submitted a statement which without objection will be received in the record in its entirety. You are now free to proceed.

I might add that Mr. McClory of Illinois, our distinguished colleague off to my left here, has a very great interest in this subject, and I am delighted that he is with us today.

I know you have, Mr. McClory, because Mr. Gudger said that you probably know as much about this as anybody.

Mr. MCCLORY. I am here to learn, Mr. Chairman.

Mr. DANIELSON. That is in the record now.

Proceed, sir.

TESTIMONY OF FRED ISRAEL, COUNSEL, STENCEL AERO ENGINEERING, INC.

Mr. ISRAEL. Mr. Chairman, members of the committee, ladies and gentlemen, thank you for inviting me here this morning to testify on these two bills. From the questions and the comments from the committee members, I can tell that you have read our statements and are well versed in the facts. I would like to make a few introductory remarks, and then try not to keep you here until October, so that you can get out and be reelected.

Mr. DANIELSON. The point is there are other witnesses, and I would like to hear from all of them if possible.

Mr. ISRAEL. Yes, sir.

Mr. DANIELSON. Just ad lib it and give us your best points.

Mr. ISRAEL. The best point was made in the public contract newsletter of the American Bar Association.

"Strict product liability is the rule in practically all states."

A strict liability case unlike a negligence case does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's

control. "In commercial cases, if the defect is the result of a design deficiency, then the manufacturing companies can secure indemnification from the design company. But this not the case for military contracts. If the Air Force, for example,"—as it did in the Stencel case—"develops detailed specifications and these are strictly followed by the contractor" without fault or negligence, "but nevertheless, the item is defective due to a design deficiency and a serviceman is injured thereby, the manufacturing companies are strictly liable—and the U.S. Supreme Court has held in the *Stencel Aero Eng. Corp.* v. *United States*, 97 S. Ct. 2054 (1977), case that the United States is not liable for indemnification, even though the United States was at fault."

Mr. Chairman, when I came here this morning I saw Mr. Dale W. Church, the Honorable Dale Church, Deputy Under Secretary of Defense for Acquisition Policy, and for the first time saw his statement. I would call the committee's——

Mr. DANIELSON. You beat me because you got here before I did and I did not see the statement until after I arrived.

Mr. ISRAEL. I would like to call the committee's attention to the first full sentence in the third paragraph:

"In general we agree"—and I presume Mr. Church is speaking——

Mr. DANIELSON. Is that on page 1?

Mr. ISREAL. No; it is actally on the third page. There is a title page and then there is a summary page, and it would be page 1 which starts, "Mr. Chairman and members of the committee."

Mr. DANIELSON. Is it in that third paragraph?

Mr. ISRAEL. Yes; it is.

Mr. DANIELSON. I notify the meeting that I have been notified that page 1 is being changed, and I call that page 1, so I do not know what you are talking about here.

Proceed.

Mr. ISRAEL. If page 1 is being changed I hope Mr. Church would not change the following: "In general, we agree that the Government should indemnify contractors where the Government was responsible for or shared in negligence" which led to an unsafe product.

I would hope that Mr. Church and the Department of Defense would not step off of that very straightforward statement.

In the *Stencel* case, what we had was the following: Stencel received a contract, and the method of performance, the drawings, et cetera which related to the parachute pact were specific and exact. During the testing period, Stencel determined that the riser wires, that is the thing that connects the man to his canopy, caught underneath the ripcord channel of the parachute pack. Stencel brought this to the attention of cognizant personnel in the Air Force, and they said, "We have seen this problem before. No change is necessary." Stencel said they would like to make a change and the Air Force said none was necessary, "Proceed with your contract."

There was a subsequent series of tests, and not only did the riser wire catch under the channel, but it was actually cut, cut so severely that the canopy would have been useless had a man been there, and the man simply would have plummeted to the ground, as did the dummy that was there instead of a man.

Stencel suggested a change by which the riser wire would be routed so that it could not in any way impinge on the channel. The Air Force using its own technicians and expertise, and I think it is important to understand that the United States does have expertise,

it maintains that it has expertise in its technical establishment, stated that they did not agree with the Stencel change. They thought that there was a simpler, cheaper change, namely beef up the section, put a patch on there so that if the riser wire caught it would not be cut.

Subsequently Captain Werner was issued a parachute. He ejected. He was injured, and subsequently died from those injuries. Stencel sought indemnification from the United States. Had this statute been enacted, Mr. Church's stated policy that the Government should indemnify contractors where the Government was responsible for or shared in the negligence which led to an unsafe product, we would not be here today.

The United States should bear the responsibility for its own acts much as any commercial person bears the responsibility for his acts. It has been a long time in this country since we have abandoned the thought that the king can do no wrong. There have been waivers of sovereign immunity. We believe that the Federal Tort Claims Act should specifically have covered this particular situation. There is nothing in the legislative history of the Federal Tort Claims Act which should have precluded recovery by Stencel here.

[The information follows:]

SUMMARY OF THE WRITTEN STATEMENT OF FRED ISRAEL IN SUPPORT OF H.R. 535 AND H.R. 5358

In 1977, the United States Supreme Court decided *Stencel Aero Engineering Company* v. *United States*, 431 U.S. 666. The Supreme Court's decision in that case has created an unjust and inequitable situation. The *Stencel* decision stands for the principle that a government contractor cannot obtain indemnification from the Government where that contractor is held liable for money damages to a serviceman for injuries caused by a defective product, even if the Government is responsible for and mandates the design of that defective product.

The problem thus created has been best summarized by the Section of Public Contract Law of the American Bar Association. The Section's January 1980 newsletter described it thusly:

Strict product liability is the rule in practically all states. This basically means that those companies which have a part in making an item are liable for damages caused by defects in the item even if the company did not contribute to the defect. In commercial cases, if the defect is the result of a design deficiency, than the manufacturing companies can secure indemnification from the design company. But this is not the case in military contracts. If the Air Force, for example, develops detailed specifications and these are strictly followed by the contractor but, nevertheless, the item is defective due to a design deficiency and a serviceman is injured thereby, the manufacturing companies are strictly liable—and the U.S. Supreme Court has held in the *Stencel Aero Eng. Corp.* v. *United States* 97 S. Ct. 2054 (1977) case that the United States is not liable for indemnification, even though the United States was at fault.

Public Contract Newsletter, "Product Liability," January 1980, at 1–2.

The legislation presently being considered by this Committee would correct the unfairness of the decision in Stencel by establishing that the United States is liable for indemnification under the circumstances in the Stencel case and the Private Bill would provide relief for Stencel.

JULY 21, 1980 STATEMENT OF FRED ISRAEL BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS OF THE HOUSE COMMITTEE ON THE JUDICIARY IN SUPPORT OF H.R. 5351 AND H.R. 5358

I appreciate this opportunity to testify in support of H.R. 5351, the Government Contractors' Product Liability Act of 1979, and H.R. 5358, a bill for the relief of Stencel Aero Engineering Corp. My professional experience with government procurement, dates back to 1949; I worked as a government and then private sector engineer and subsequently became a lawyer in private practice specializing in Federal procurement. I have been both a Vice President and member of the Board of Directors of Stencel Aero Engineering Corp.

In 1977, the United States Supreme Court decided *Stencel Aero Engineering Company* v. *United States*, 431 U.S. 666. The Supreme Court's decision in that case has created an unjust and inequitable situation. The *Stencel* decision stands for the principle that a government contractor cannot obtain indemnification from the Government where that contractor is held liable for money damages to a serviceman for injuries caused by a defective product, even if the Government is responsible for and mandates the design of that defective product. The legislation presently being considered by this Committee would correct the unfairness of the decision in Stencel by establishing that the United States is liable for indemnification under the circumstances in the Stencel case and the Private Bill would provide relief for Stencel.

The general rule once was that the Government was immune from any suit, e.g., the King can do no wrong. That doctrine has been significantly eroded. See *Feres* v. *United States*, 340 U.S. 135, 139 (1950). For example, Congress has enacted legislation removing the defense of sovereign immunity in contract claims against the United States. 28 U.S.C. § 1491. The United States Supreme Court has ruled that when the United States enters into a contract, the contract is to be construed, and the rights of the parties are to be determined, as if the contract is between private parties. *Reading Steel Casting Co.* v. *United States*, 268 U.S. 186, 188 (1925); *United States* v. *Standard Rice*, 323 U.S. 106 (1944). Indeed, it has been said that when the United States enters into commercial transactions, it sheds its cloak of sovereignty and is treated by the law as a private person would be treated in similar circumstances. Likewise, when Congress enacted the Federal Tort Claims Act, it waived the Government's sovereign immunity defense against claims arising from the torts of the Government's officers and employees. The Supreme Court has characterized that Act as "the culmination of a long effort to mitigate [the] unjust consequences of [the] sovereign['s] immunity from suit." *Feres, supra*, 340 U.S. 15 at 139.

If the Supreme Court had applied the well-established principle that the United States is to be treated as a private person in lawsuits arising from the Government's contracts or torts, we would not be here today. The rule which governs litigation between private parties is that a manufacturer can secure indemnification from the designer of a product if the manufacturer is held liable for damages arising from a product defect caused by a design deficiency.

The facts concerning Stencel's contracts with the U.S. Air Force pursuant to which Stencel produced parachute packs and kits for the Air Force are detailed in Mr. R. M. Strickland's excellent statement, which I hereby adopt and incorporate. A copy of Mr. Strickland's statement is attached hereto. For present purposes, I will simply reiterate that the Air Force mandated that the parachute packs and kits conform to an Air Force design. Stencel was contractually prohibited from deviating from the Air Force design without an Air Force approved change order. The Air Force's contractually mandated design was defective and the Air Force's modification to cure that design defect was similarly defective. Stencel had proposed a complete correction to the Air Force's defective design, but the Air Force overruled Stencel and insisted that the Air Force's defective design modification be used.

The *Stencel* case decided by the Supreme Court involved a serviceman who was permanently injured in the line of duty. He was awarded a substantial lifetime pension pursuant to the Veterans' Benefits Act. He also sued Stencel on a product liability theory. Stencel cross-claimed against the United States for indemnification, asserting that any malfunction attributable to Stencel's manufacture was caused by the Government's defective design, a design which the Government required Stencel to use. The Supreme Court, however, found that the Government had a defense against Stencel's cross-claim for indemnification based on an extension of an earlier decision in which the Court had held that servicemen cannot recover for service-related injuries under the Federal Tort Claims Act. *Feres* v. *United States*, 340 U.S. 135 (1950).

In *Feres*, the Supreme Court was faced with the question of whether or not a serviceman injured in the line of duty could pursue a claim against the United States under the Tort Claims Act. Without support in the legislative history, the Court decided that Congress had not created a new cause of action for service-related injuries. This decision was based in large part on the fact that Congress by other legislation had already established a system to provide "simple, certain, and uniform compensation for injuries or death or those in [the] armed services." *Feres, supra*, 340 U.S. at 144. The Court therefore concluded that Congress had established an exclusive no-fault compensation system for servicemen injured in the course of official duty and that additional recovery could not be sought under the Tort Claims Act.

While the *Feres* decision appears to be logical and equitable because the Court found that the serviceman was adequately compensated, the same cannot be said of the *Stencel* extension of *Feres*. In *Stencel*, the Court decided that because the serviceman could not seek relief from the Government under the Tort Claims Act, the contractor could not obtain indemnification from the Government where the serviceman had a private cause of action against the contractor under product liability law.

In deciding against Stencel, the Court stated that an essential purpose of the Veterans' Benefits Act was to limit the Government's liability and that to permit Stencel to obtain indemnification would frustrate that purpose.

Yet in holding that contractors such as Stencel do not have a cause of action against the United States for indemnification, the Court has placed on third parties ". . . the burden of fully compensating injuries to servicemen when the Government is at fault." *Stencel, supra*, 431 U.S. at 675 (dissenting opinion of Mr. Justice Marshall in which Mr. Justice Brennan joined). As the dissenters recognized, there is nothing in the Veterans' Benefits Act to suggest such a purpose. *Id.* In treating *Stencel* as an impermissable attempt to circumvent the compensation system established by Congress, the Supreme Court has transformed government contractors into insurers providing supplemental benefits to servicemen for injuries caused by the United States.

The problem thus created has been best summarized by the Section of Public Contract Law of the American Bar Association. The Section's January 1980 newsletter described it thusly:

Strict product liability is the rule in practically all states. This basically means that those companies which have a part in making an item are liable for damages caused by defects in the item even if the company did not contribute to the defect. In commercial cases, if the defect is the result of a design deficiency, then the manufacturing companies can secure indemnification from the design company. But this is not the case in military contracts. If the Air Force, for example, develops detailed specifications and these are strictly followed by the contractor but, nevertheless, the item is defective due to a design deficiency and a serviceman is injured thereby, the manufacturing companies are strictly liable—and the U.S. Supreme Court has held in the *Stencel Aero Eng. Corp.* v. *United States* 97 S. Ct. 2054 (1977) case that the United States is not liable for indemnification, even though the United States was at fault.

Public Contract Newsletter, "Product Liability," January 1980, at 1–2.

H.R. 5351 Would prospectively prevent the Government from imposing the liability for the Government's mistakes on contractors who were required to use the Government's defective designs and/or components. This would be accomplished by establishing the contractor's right to seek indemnification from the United States as if the United States were a private party. The legislation would not transform the Government into a general insurer of the contract; rather, it would ensure basic justice and fairness by requiring the Government to bear the cost of its mistakes instead of transferring such costs to third parties.

Similarly, as Mr. Strickland said in his statement and as the dissenters to the Supreme Court's *Stencel* decision recognized, Stencel has been required to pay for the Air Force's negligence in promulgating defective drawings and requiring Stencel to produce parachutes in accordance with the Air Force's defective design.

The Court in Stencel was concerned that " 'To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door.' " *Stencel, supra*, 431 U.S. at 674. The Court clearly was inviting Congressional action and H.R. 5351 is such a fair and just approach. H.R. 5358 serves the interests of equity and justice by at least partially reimbursing Stencel for its damages.

STATEMENT OF ROY M. STRICKLAND, JR., PRESIDENT OF STENCEL AERO ENGINEERING CORPORATION, IN SUPPORT OF H.R. 5358

We appreciate this opportunity to present the reasons why H.R. 5358, a bill for the relief of the Stencel Aero Engineering Corporation ("Stencel"), should be enacted.

The purpose of this bill is to compensate Stencel for losses it sustained as a result of settling a products liability claim made by the heirs of James Donald Werner, Captain U.S.A.F. (deceased). Captain Werner died from injuries sustained while ejecting from a disabled F–102 aircraft. Captain Werner's injuries

resulted from a defectively designed parachute pack. The parachute pack was manufactured to an Air Force created and contractually mandated Air Force design.

The following facts conclusively prove that Stencel's liability arose from the Air Force's failure to act on Stencel's requests for a design modification which would have cured the design defect and prevented this tragedy.

During the late 1960's Stencel performed several contracts for the United States Air Force. The contracts were for the development of ejection seat upgrade kits including the parachute for the F–100 and F–102 aircraft. The Air Force mandated that the parachutes to be supplied under the contracts must be in conformance with Air Force approved designs. By the terms of the contracts, Stencel could not deviate from the Air Force approved designs without an approved change order from the Air Force.

The Air Force conducted tests of the F–102 upgrade kit during 1968. These tests demonstrated that either of the parachute's risers might catch under the parachute pack's metal ripcord channel. Stencel reviewed the Air Force test results and stated to the Air Force that based on the Air Force's test data Stencel believed that the Air Force approved parachute pack design might be defective. The Air Force in reply assured Stencel that parachute risers had previously been caught beneath ripcord channels and that the Air Force did not concur with Stencel's concern. The Air Force test report of the F–102 upgrade kit tests stated that all the tests were successful, despite the fact that a riser had caught beneath the ripcord channel. The Air Force stated that no change was necessary and directed Stencel to produce the parachutes in accordance with the Air Force's design.

Stencel was awarded a production contract to provide the Air Force with F–102 upgrade kits including parachutes and parachute packs; Stencel was also awarded a subcontract for upgrading the F–100 escape system, including its parachute and parachute pack. The F–102 upgrade kits, including parachutes and parachute packs, and the F–100 escape system upgrade kits, including parachutes and parachute packs, were to be delivered in accordance with the mandated Air Force design.

After Stencel was awarded the second contract, an F–100 parachute failed in a test; the test failure was caused by a parachute riser being caught on the end of the ripcord channel this resulted in the riser being cut in two. This was similar to the type of test failure which had been previously observed in the F–102 tests. After the test failure, Stencel urged the Air Force to change the parachute design. Stencel recommended that the change be accomplished by adding a metal strip across the parachute container. The metal strip was designed to guide the risers out of the parachute container and over and above the ripcord channel. This design change would have eliminated the possibility that a riser could be caught or cut by the metal ripcord channel.

The Air Force refused to permit Stencel to implement its proposed design change. The Air Force designed a change which it believed would eliminate the riser damage problem. The Air Force ordered Stencel to place a patch of heavy fabric material on the parachute pack to prevent the damage to the risers even if the parachute system was interfered with by the ripcord channel. Stencel had proposed a design change which would eliminate any possibility that the risers could catch on, or be cut by, the ripcord channel. The Air Force ordered Stencel to fabricate parachutes in accordance with the Air Force design change.

On July 27, 1971, Captain Werner was flying an F–102 aircraft. The aircraft became disabled and Captain Werner ejected from the aircraft. Captain Werner died from injuries he sustained as a result of events arising from the aircraft malfunction. An Air Force investigation of the accident was conducted. The Air Force concluded that Captain Werner's injuries were directly attributable to and caused by his parachute's right hand riser being caught under the ripcord channel. Obviously the Air Force design change had not corrected the parachute pack design defect.

After Captain Werner's death the Air Force ordered a design change to prevent future injuries or death arising from parachute risers catching under the ripcord channel. The purpose of this second Air Force design change was to provide a design result similar to that advocated by Stencel before Captain Werner's death. There have been ejections from F–100 and F–102 aircraft since this second design modification. In none of these later ejections was there an instance of a parachute riser being caught or cut by a ripcord channel.

Stencel's liability arose from its manufacture of the parachute to a mandated, defective Air Force design and from the fact that the Air Force issued its defec-

tively designed parachute to Captain Werner for his use. As a result of the suit, Stencel paid damages and incurred costs incidental to the suit in the amount of $187,000.

Stencel sought judicial relief in the form of an indemnity from the United States for the claim made against and paid by Stencel to Captain Werner's heirs. In this and similar cases brought by Stencel, the United States District Court, Court of Appeals and Supreme Court have held that Stencel failed to state a cause of action under the laws of the United States. The courts used as a springboard for their decision *Feres* v. *U.S.*, 340 U.S. 135 (1950). In *Feres* the Supreme Court held that the United States is not liable for money damages to servicemen who are injured in the course of their military service. In *Stencel Aero Engineering Corp* v. *U.S.*, 431 U.S. 800 (1977), the Supreme Court broadened the *Feres* doctrine and concluded that a contractor to the United States cannot receive an indemnity judgment arising from the acts or neglects of the United States even when these acts or neglect are the proximate cause of death or injury to a serviceman. Stencel has exhausted its judicial remedies. Relief can now only come from Congress in the form of the private bill now before it.

The Air Force has advised this Committee that it opposes any indemnity to Stencel. The Air Force bases its opposition on the fact that Stencel should have taken into account in pricing of the Contract, the possibility of a product liability claim. Until the Supreme Court's decision in 1977, it was not foreseeable that *Feres* barred third party indemnity claims. See e.g., *Wellington Transportation Company* v. *U.S.*, 481 F.2d 108, III (6th Cir. 1973) (". . . nothing in the [Supreme] Court's [*Feres*] opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States.").

The Air Force has also argued that to permit Stencel to recover "would be to admit at the back door that which has been turned away at the front door." This argument is derived from the Supreme Court's decision in *Stencel*. The Court was concerned that it not "*judicially* admit at the back door that which has been *legislatively* turned away at the front door." (emphasis added) *Stencel*, 431 U.S. at 673. The Supreme Court's decision not to circumvent the legislative intent of Congress obviously does not bar Congress itself from granting relief in a deserving case.

Stencel has been required to pay for the Air Force's negligence in promulgating defective drawings and in ignoring Stencel's warnings of the design defects and in requiring Stencel to produce parachutes in accordance with the Air Force's defective design. Equity and justice require that this bill be enacted and Stencel made whole.

Mr. DANIELSON. Sir, did you raise that point in court?

Mr. ISRAEL. Yes, it was raised. I did not argue the case.

Mr. DANIELSON. No, but was the point raised in court?

Mr. ISRAEL. It was.

Mr. DANIELSON. Did the court make a decision on it?

Mr. ISRAEL. It did.

Mr. DANIELSON. We are not a court of review.

Mr. ISRAEL. If I may, the court specifically spoke of the legislative intent, which throws it right back to the Congress to review.

Mr. DANIELSON. That is right, but what I am getting at, sir, is we are not an article III organization, we come under article I of the Constitution. We do not review the decisions of the district courts, the courts of appeals, the Court of Claims, the Supreme Court, or any other court. If we have to change legislation we do, but we do not review the decisions of the courts.

Mr. ISRAEL. I recognize that, and our position on the public bill is, of course, to change the legislation. Our position on the private bill is a petition for redress of grievances, which I think is appropriate to this legislative body.

Mr. DANIELSON. That is correct, but your argument was that the court is wrong, and whether they are wrong or not they are where they are as far as I am concerned.

Mr. ISRAEL. The only reason I brought that up, Mr. Chairman, was to tell you that I believe the court's opinion specifically solicited the national legislature to look once again at the court's as to the legislative intent. The court stated what it believed was the legislative intent. It is now up to the Congress to indicate whether or not the court has stated it properly prospectively. Whatever the court said retrospectively of course binds the United States as to the past.

A government contractor is caught in the following set of circumstances. He is given a specification which he must follow, under the penalty of being in breach if he does not follow it. If a contractor decides that he thinks the Government is wrong, and states so, and asks for a change to his contract, if the contracting officer says to him "I do not agree, perform as I have stated," under the disputes clause, which is a mandatory clause, having the full force and effect of law, the contractor must continue to perform as directed.

Stencel had to continue to perform or would have been in breach even if Stencel had been right. That is the law here. The Government has two policies. One, it desires to have its contracts move forward as it directs those contractors. It calls the shots, without the contractor being able to second-guess the contracting officer who speaks for the United States when that contracting officer says perform as I say.

On the other hand, if it insists on that type of performance the U.S. Government must bear the same risk as any commercial company. For a number of years the courts have said that when the United States steps down from its seat of sovereignty, and enters the commercial marketplace to buy goods and services, it is to be treated precisely the same as any other private citizen. I think that is good law, and that is what the genesis and the thrust of this bill is, Mr. Chairman. It would require the United States to answer as if it were a private citizen, and it would require the United States to indemnify where it has been wrong.

Mr. DANIELSON. I get your point, sir.

Mr. Harris.

Mr. HARRIS. Thank you very much, Mr. Chairman.

Do you feel that the Stencel case is distinguishable from those cases, from some of the cases that would be covered by the general legislation?

Mr. ISRAEL. When I read the legislation, Mr. Harris, I was reading it really through my Stencel filter.

Mr. HARRIS. I'll bet you were.

Mr. ISRAEL. As I was reading it through the Stencel filter I took it to be that the Government would indemnify contractors where the Government was responsible for or shared in the negligence, and it is possible, of course, that it could be read more broadly. It is also possible that any lawyer who was handling another plaintiff would read it more broadly and ask the court to interpret it.

Mr. HARRIS. I would express it probably more precisely than possible. I doubt if there is any question that the legislation covers cases where there are no proved acts of negligence on the part of the Government. I do not think there is any question about that.

Mr. ISRAEL. Mr. Harris, I would ask you if you would reflect on the following as well. That contracts between private parties are not only promises but they are also mutual allocations of risk, The United States is not an unsophisticated buyer.

Mr. HARRIS. I had understood your argumentation on that, and it may or may not be correct. The point that I wanted to explore was whether you felt that Stencel was distinguishable from the broad application of the general legislation.

Mr. ISRAEL. I think that Stencel represents that case most requiring remedial legislation now.

Mr. HARRIS. And that this legislation would in fact cover cases that were not in exactly the same footing as the *Stencel* case?

Mr. ISRAEL. Mr. Harris, I do not want to keep the committee here while I reread the bill. My reading of it was more restrictive. Certainly you could change the legislation to be more restrictive or to let the legislative history do that.

Mr. HARRIS. No problem with that answer. That answer is responsive. Thank you. Basically if I may just review a point in my mind on the specific case that I am a little bit vague on. I hear the Government setting down specifications to a manufacturer in your case, and that manufacturer then producing according to that specification, and in the process determining that the specifications are coming up with an unsafe product, of telling the Government that it is an unsafe product, of having the Government say, "No, it is going to be all right, you go ahead," of going ahead and still determining there was an unsafe product. Of going back to the Government and saying, "It is still an unsafe product, here is the way we think it should be fixed in order to make it safe." The Government then saying, "All right, it may be a little bit unsafe. Let us change it, but not the way you want it changed, but the way we want it changed." Then the next step that I heard you say "We put a man in the parachute, and he got hurt rather badly and killed." The space in between there is a little bit vague.

I do not understand why the Government's changes were not tested out more thoroughly before we put a man in the parachute.

Mr. ISRAEL. First, the Government had not only its own specifications here, but it had its own test and acceptance criteria. It was a phase after which the prototype product, the preproduction product was supplied to the United States, in which their own technicians running their own tests determined whether or not the product was conforming to not only the specifications but the full desires.

The two incidents that I referred to where they determined that the riser wire was caught and one where it was cut only occurred during those evaluations. The Air Force decided that the fix, the change, was adequate. It then ordered Stencel to proceed in performing the contract as directed, and those parachutes were then put in F–100 and F–102 aircraft.

Mr. HARRIS. Why were they not tested though very thoroughly at that point to determine whether or not——

Mr. ISRAEL. I do not know. The testing was a function of the U.S. Air Force. Once the product was delivered to the U.S. Air Force, they tested it. They determined that if they put the single change on it, it would be adequate. They were wrong.

Mr. HARRIS. They had Stencel put the change on it. They did not put the change on it.

Mr. ISRAEL. They had Stencel manufacture the change. What we are dealing with is this: We are not dealing with a series of gears and levers which are mechanically interconnected. We are dealing with a

parachute which has a cloth canopy tied through cloth riser wires, cloth rope as it were. Those are elastic members. The wind forces can move the canopy here or there. The wind shear forces as the man enters the airstream can be different. It is not possible, you see, to test the product throughout the entire range and spectrum of all physical conditions that the ejectee is likely to see. His airplane could be, for instance, making an approach landing, in which case he is close to the ground and perhaps at 120 knots. On the other hand, he could want to eject at 12,000 feet when he is going at 600 knots. In one case he is flying straight and level. In the other case he has a tremendous sink rate. All of those variations will go into determining what happens in this very elastic situation that is going on between the riser, the man, and his canopy. Some cases we at Stencel felt could result in the catching. We wanted to classify a test as a failure if a riser caught. That is why we said change it.

The Air Force said "We have had a lot of experience with this pack. We do not think it is necessary to change." That was the answer. The Air Force was responsible for testing.

Additionally, the service itself had to determine that it would release the equipment for military use. That is their decision based on all of the data. It was a risk that they thought they had overcome by their expertise.

Mr. DANIELSON. The time of the gentleman from Virginia has expired.

Mr. HARRIS. I do not remember having any time.

Mr. DANIELSON. The Chair will recognize the gentleman from Maryland for 30 seconds.

Mr. BARNES. Thank you, Mr. Chairman.

I requested 30 seconds because I have been summoned to another meeting and I have to leave, but I want to say two things before I leave. One, I want to join in welcoming to the committee my great friend, Mr. Israel, who is one of my most distinguished constituents, and I want to recognize his wife, who is in the audience, who is one of our leading activists and really a leader in our community in Montgomery County, Md., and I did not want to leave this meeting without having the opportunity to say that, and I appreciate the opportunity, Mr. Chairman. Thank you very much.

Mr. DANIELSON. It is a pleasure, Mr. Barnes.

Mr. Moorhead of California.

Mr. MOORHEAD. You have done an excellent job of presenting your case here today.

Mr. ISRAEL. Thank you.

Mr. MOORHEAD. I am not going to ask any more questions, because I believe most of them have been covered by the previous witness. It is something we are going to have to look into, and see how we can solve the problem.

Mr. DANIELSON. Mr. McClory of Illinois.

Mr. MCCLORY. Thank you, Mr. Chairman.

Mr. Chairman, you made reference to the fact that we are not a supreme court or we are not an agency of review of Supreme Court decisions. That has been suggested. That was proposed in the early days of our Nation, and of course we departed from the English system by not having our legislative branch as the House of Commons to review the decisions and make ultimate decisions. However, we do

provide still for the right of the citizen to petition his Government through private legislation to provide relief, through that remedy, where there is no general remedy provided.

That is a right and that is a remedy. Of course, we also reserve the prerogative of changing the law where we disagree with the decisions of the Supreme Court, that are made on a legislative basis.

Mr. ISRAEL. Mr. McClory, if I may, Mr. Gudger of North Carolina, who is our Congressman, has introduced H.R. 5358, which is a private bill for relief, on the factual situation which I testified this morning.

Mr. MCCLORY. And as I indicated, I am a cosponsor of this general legislation.

Mr. ISRAEL. Yes. We thank you for that, sir.

Mr. MCCLORY. Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. McClory.

Thank you also, Mr. Israel. We will—for your information, after the private bill there will be at least one other hearing, so that Mr. Gudger can personally appear.

Mr. ISRAEL. Fine.

Mr. DANIELSON. It will be very shortly.

Mr. ISRAEL. Mr. Chairman, just one other thing. Counsel has asked me to introduce into the transcript of this hearing the accident report from the Air Force, and I would like the record kept open so that we can give it to her. She asked me for it last week.

Mr. DANIELSON. That is fine. How big is it?

Mr. ISRAEL. I think if I may talk to counsel we can abstract only those important portions.

Mr. DANIELSON. We may not let counsel do that. This is the committee. Counsel works for the committee.

Mr. ISRAEL. Excuse me. I have this. I have the full report here. I also have a telegram to the accident investigation report which I think summarizes it.

Mr. DANIELSON. We will lodge it with the committee's file, and then when it is in our possession we will know how much of it we will put into the record. You see, there is a printing problem involved. I have seen reports that are that thick, and I do not choose to saddle the taxpayer with printing such a report. We certainly do want the information available to us.

Mr. ISRAEL. Thank you.

Mr. DANIELSON. The committee will make the decision.

Mr. ISRAEL. Yes, Mr. Chairman. Thank you.

Mr. DANIELSON. Our next witness will be Mr. Dale W. Church, Deputy Under Secretary—Acquisition and Policy—Office of the Under Secretary of Defense, Research and Engineering. I have received your new page 1 and I guess it has been distributed to the committee. Without objection the new page 1 is inserted in lieu of the old page 1 and the statement as amended is received in the record.

TESTIMONY OF DALE CHURCH, DEPUTY UNDER SECRETARY—ACQUISITION AND POLICY—OFFICE OF THE UNDER SECRETARY OF DEFENSE, RESEARCH AND ENGINEERING

Mr. CHURCH. Let me point out for everyone what the change was and what happened. In redoing and rewriting the statement there was no intent to leave out the catastrophic liability situation. However, in the page that initially came over catastrophic liability was left out,

and that is certainly one area where I think legislation is needed. Contractors do need protection, and I wanted to make sure that that got in the statement, and that is what the change was. It was merely to add——

Mr. DANIELSON. Sir, the change that Mr. Israel was concerned about is not changed in your new statement then; is that correct?

Mr. CHURCH. It works in that same sentence, so the new sentence is as Mr. Israel read it except that it adds "or in the catastrophic liability situation," so it actually adds something.

Mr. DANIELSON. It amplifies.

Mr. CHURCH. It amplifies, actually adds a thought which had inadvertently been left out. I would like to have the statement presented in the record.

Mr. DANIELSON. It has already been received.

[The information follows:]

THE DEPARTMENT OF DEFENSE STATEMENT ON H.R. 5351

SUMMARY OF CONTENTS

The Department of Defense endorses the stated purpose of H.R. 5351 to "establish just standards of ultimate liability" on a Government-wide basis with respect to third party claims against Government contractors for damage caused by products delivered to the Government. However, DOD opposes H.R. 5351 because it (i) requires the Government to indemnify contractors for their own negligence, (ii) requires the U.S. Government to assume the liability which could be the responsibility of a foreign government, (iii) drastically expands the tort liability of the Government as now addressed in and limited by other statutes, and (iv) it would result in an erosion of military benefits for the benefit of Government suppliers.

Mr. Chairman and members of the committee: I am pleased to present to you the views of the Department of Defense concerning the proposed Government Contractors' Product Liability Act of 1979.

The Department of Defense endorses the stated purpose of H.R. 5351 to "establish just standards of ultimate liability" on a Government-wide basis with respect to third party claims against Government contractors for damage caused by products delivered to the Government.

In general, we agree that the Government should indemnify contractors where the Government was responsible for or shared in negligence, or in the catastrophic liability situations. We oppose H.R. 5351, however, because it is drafted so broadly that it would require the Government to indemnify a contractor against any and all liability claims regardless of the item supplied and whether or not the contractor complied with the contract specifications in producing the item or otherwise exercised due care in its manufacture. Government purchases range from canned peaches to sophisticated military systems. The Government should not be expected to indemnify contractors for liability claims arising from the supplying of commercial items or items made in accordance with commercial standards accepted by the Government.

In addition, Section 5 of H.R. 5351 would make the United States liable for indemnity in cases involving weapons and other equipment sold or given to foreign governments. The United States Government has no control over the use of such equipment after sale or gift, however, the United States could become responsible for indemnifying contractors for injuries to foreign nationals resulting from use of weapons and equipment by foreign governments.

Further, we oppose enactment of H.R. 5351 because it would also drastically expand the tort liability of the Government as now addressed in and limited by other statutes. For instance:

Negligence is an absolute prerequisite to liability of the Government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680. Under existing law, the United States may be held liable, just as a private individual, for the negligence of its employees. Under the proposed law the United States would contract to accept tort liability by indemnifying a contractor for that contractor's own negligence without a requirement for any corresponding negligence on the part of the United States.

Also, members or survivors of members of the United States Armed Forces could sue a contractor for injury or death. In the cases covered by the bill, the contractor would be entitled to then seek and receive indemnity from the United States, thus overriding the decision of the Supreme Court in *Feres* v. *United States* (340 U.S. 135 (1950)) and *Stencel Aero Engineering Corp.* v. *United States* (431 U.S. 666 (1977)) that a member of the armed forces has no cause of action for an injury incident to his service and that the Government is not liable as a third party for contribution or indemnity where the underlying claim is for such injury. The major rationale for these decisions was that Congress had already instituted a comprehensive statutory system for compensating Service personnel and their survivors for death or injury, which was intended to be the exclusive remedy in these cases.

The Federal Employee's Compensation Act, 5 U.S.C. §§ 8101, also may be effectively nullified in the cases covered by the bill. Under that Act a civilian employee of the Government has a worker's compensation-type remedy against the United States for injuries suffered in the performance of duty, whether or not the Government would be liable for the tort. This is made the exclusive remedy against the Government by 5 U.S.C. §§ 8116(c). Under the proposed law, such a person would be able to seek and receive FECA benefits from the United States and recover a second time from the Government via indemnification of the contractor. Thus, the United States would be paying a double recovery, and exclusivity of FECA would be defeated. As a potential defendant in every product-related accident, the United States would be seen as an adversary by its own employees, a specific consideration of the Supreme Court, discussed in the *Feres* decision. The impact on morale is obvious.

Finally, we object to Section 3 of the proposed bill, which amounts to a partial repeal of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §§ 501–590. Under the provisions of 50 U.S.C. §§ 525, a period of military service shall not be included in computing the running of a statute of limitations for the bringing of an action by a member of the Armed Forces, his executor, or his heirs. Section 3 of H.R. 5351 would deny this relief to members of the Armed Forces suing a supplier of products to the Government. The policy behind 50 U.S.C. App. §§ 525 is that a serviceman's cause of action should not be allowed to expire because his military service prevents him from filing suit within the required statute of limitations. When a serviceman is injured due to the negligence of a Government supplier, he should be allowed the benefit of 50 U.S.C. App. §§ 525. The enactment of Section 3 of H.R. 5351 would be an erosion of military benefits for the benefit of Government suppliers.

That concludes my prepared statement. I would be happy to answer any questions you may have.

Mr. CHURCH. In the interest of time I will just quickly summarize what the DOD position is on this. That is that we do endorse the stated purpose of the bill, and as Mr. Israel read, we certainly agree that the Government should indemnify contractors where they are responsible or have shared in the negligence, or to keep people in business in situations involving weapons systems and defense items. We need to cover the catastrophic liability situation. Otherwise we may end up with no suppliers at all.

We, however, oppose the specifics of the bill, because it is drafted so broadly that it does tend to indemnify a much wider range of situations than we believe merit this kind of relief, or even should under the circumstances. The bill goes to any and all liability claims regardless of the item, and regardless of whether the contractor complied with the specifications, so where the Government specification was right, the contractor is still indemnified even if he did it wrong.

The foreign government situation is one which bothers us. The United States has no control of the use of items once they are in the hands of foreign governments. Indemnifying them for any kinds of use, some of which may be totally unauthorized with respect to the specification or whatever is beyond our scope, and for us then to turn

and indemnify the activities of those foreign governments against liabilities of third parties, we think, is further than we would like to see the indemnity go.

The bill also tends to negate a longstanding line of law with respect to the Federal Tort Claims Act, the Federal Employees Compensation Act, and the Soldiers and Sailors Relief Act. In all of those three cases we believe it should be structured so that it retains the basic body of law surrounding those acts, particularly in the case, for example, in the Soldiers and Sailors Relief Act, where a serviceman has the ability then to have the running of the statute of limitations. This bill would tend to knock that out, and we think where a man is in service to his country overseas, and cannot get back to file his claim, certainly we would not want the statute of limitations to deprive him of his right to file. Little subtleties like that tend to get wiped out in a rather broad sweeping approach that the bill takes, and as I say, in summary, we like the intent of the bill. We think it goes in the right direction. We think it needs a lot of restructuring to get not only to the situation which needs relief, but to leave out those which we believe get swept in under this broad brush.

Mr. DANIELSON. Sir, your comments in their entirety are addressed to the bill H.R. 5351?

Mr. CHURCH. Yes; they are.

Mr. DANIELSON. The general law bill which is before us. Do you have any comments with respect to this private bill, H.R. 5358, which relates only to Stencel Aero Engineering Corp.?

Mr. CHURCH. I do not.

Mr. DANIELSON. Mr. McClory of Illinois.

Mr. MCCLORY. Thank you, Mr. Chairman.

I am pleased to receive your statement with regard to general support for the objectives of H.R. 5351. Noting your objections to certain parts of the bill, would you be willing to supply to the committee or have your counsel supply to the committee suggested amendments that would satisfy your objections? Then we could act on a measure which would fulfill the aims of the sponsors, of which I am one, and likewise coincide with your views or meet your objections?

Mr. CHURCH. We will certainly do our best. As you are also probably well aware, there have been committees meeting on this subject for several years trying to decide where to draw the lines, and it is not a subject that has been amenable to easy decision. Even getting a consensus from any group is difficult, but we will certainly do our best, and will attempt to add language which will fulfill our objections.

Mr. MCCLORY. I can well understand your objections to providing a program of indemnification of foreign governments, including factions of foreign governments. I think that does go beyond what our needs are at the present time. Also, we could narrow the coverage to take care of these meritorious cases, such as I think are implied in the *Stencel* case. That that would be most helpful. So, I would appreciate communication from you as to what amendments you feel you can offer, or at least communication indicating how these objections might be met.

Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you, Mr. McClory.

Mr. Harris.

Mr. HARRIS. I have no questions. Thank you, Mr. Chairman.

Mr. DANIELSON. Thank you very much.

Thank you, Mr. Church. In line with what Mr. McClory just said, this bill will no doubt be reintroduced in the next Congress. Hopefully Mr. Gudger will be here to do it, and hopefully Mr. McClory will be here.

Mr. MCCLORY. Thank you, Mr. Chairman.

Mr. DANIELSON. To lend his support.

Mr. HARRIS. I will be willing to help, too, Mr. Chairman.

Mr. DANIELSON. Thank you very much.

In the meanwhile if you think of some ways in which the editing of the bill could be improved upon, we would welcome your suggestions. It would save time in the long run. Thank you very much.

Mr. CHURCH. Thank you, Mr. Chairman.

Mr. DANIELSON. We have one witness remaining, Mr. Miles Rubin. Mr. Rubin is here representing Pioneer Systems, Inc. Will you not please come forward. Without objection, your statement will be received in its entirety.

[The information follows:]

SUMMARY STATEMENT OF MILES L. RUBIN

Pioneer International Corporation, a subsidiary of Pioneer Systems, Inc., which manufactures various types of parachutes and aircraft and missile deceleration, retardation, recovery and aerial delivery systems under government contracts, advocates the passage of H.R. Bill 5351.

This legislation would properly shift the burden of product liability from the innocent manufacturer to the government, which is solely responsible for specification defects. This will also result in reduction of government contract prices as a result of elimination of high liability insurance and reduction of manufacturers' risk factor costs.

The passage of the "Government Contractors' Product Liability Act of 1979" will serve two important purposes: (1) to alleviate an inequitable, unjustified burden upon companies that manufacture products pursuant to government specifications; and (2) to reduce the United States Government costs, thereby preserving valuable tax dollars.

Pioneer International Corporation, a subsidiary of Pioneer Systems, Inc., manufactures various types of parachutes and aircraft and missile deceleration, retardation, recovery and aerial delivery systems.

For many years government contracts with all branches of the Armed Forces and N.A.S.A. have accounted for approximately seventy (70 percent) percent of the Corporation's business. As either the prime contractor or subcontractor, Pioneer International's sales to the United States Government exceeded $13,000,000 in 1979.

Most often, these contracts set forth predetermined government specifications encompassing every minute facet of production. The government establishes the precise design and material composition of every product, formulates the complex-manufacturing and packing processes, scrutinizes the manufacturer's proper implementation of each and every procedural step, and conducts extensive tests and inspections of the product throughout its course of manufacture and after its completion.

While performing the task of strictly complying with and carrying out voluminous government requirements, the manufacturer has absolutely no input in creating or discretion in implementing the specifications. Notwithstanding its total lack of input and control, and without any rational basis or justification, the manufacturer, such as Pioneer International, is exclusively responsible for all damages resulting from defects in government contract specifications under the prevailing law. By setting aside in this specific instance the doctrine of soverign immunity, H.R. Bill 5351 finally eradicates this enequity: imposing liability on the government to indemnify the manufacturer for claims based upon defects in the specifications decreed by the government.

Because they remain solely liable for defects in government specifications under the current law, Pioneer International and other prudent government contractors must secure extensive product liability insurance. Such insurance is difficult to

procure and the premiums are exorbitantly priced. During the year 1979, Pioneer International paid approximately $90,000 in premiums for product liability insurance coverage of $10,000,000 for any single accident or occurrence to cover its exposure under government contracts. The premiums for such coverage over the last four years have exceeded $400,000.

These insurance costs, as well as the risk of potential liability in excess of insurance policy limitations, must be included in the manufacturers' computations of cost on government contracts. Combination of these two factors invariably leads to a higher cost of product to the government than one would obtain were it to indemnify against potential liability. This is the natural result of the inevitable pass along of cost of premiums (which includes actuarial costs plus profit to the insurance companies) and the addition of a risk factor cost element which must be faced by the manufacturer. With the passage of the "Government Contractors' Product Liability Act of 1979," government contract prices could be reduced and substantial tax dollars preserved.

Only two product liability claims have arisen under all of Pioneer International government contracts in the last four years, and no funds have been paid by the insurance carriers on either claim. If the government had been liable for such claims based upon its alleged specification defects, Pioneer International would not have incurred the aforesaid insurance premium expenses in excess of $400,000, contract prices would have been reduced, and the government would have saved this money without making any payments on liability claims.

The relatively small, private manufacturers cannot bear the risk of product liability exposure without procuring insurance, regardless of how remote this exposure is. Quite to the contrary, the government can bear such a minimal risk of liability without insurance coverage, thereby saving substantial sums of money.

It would seem to be both logical and ethical that the government, not the manufacturer, should be held accountable for defects in contract specifications created by the government and imposed upon manufacturers. By passing H.R. 5351, Congress will redress this anomaly, and, at the same time, will be exercising sound financial judgement and reducing government expenditures.

TESTIMONY OF MILES RUBIN, PRESIDENT, PIONEER SYSTEMS, INC.

Mr. RUBIN. Mr. Chairman and members of the committee, I am president of Pioneer Systems, one of whose divisions is involved in the production of parachutes, a business that they have been engaged in for over 60 years. Our business breaks down into three components. We do research and development work. We build special retrieval systems and recovery systems, delivery systems for things ranging from tactical weapons to the recovery system for the booster rockets on the Space Shuttle. Our third business is the one that is involved in the legislation under consideration here, which is the production of parachutes to Government specifications, where through a bid process we bid on Government specification packages and build a parachute specifically to the design and requirements of the U.S. Government.

I think that the issue has been broadly raised today. I think everyone understands what the problem is. I think if I can just talk for a while as to how this affects our company, that might be interesting to you.

Mr. DANIELSON. It would be very helpful.

Mr. RUBIN. We insure against product liability by purchasing a general aircraft products liability insurance. The cost of this insurance ranges from the area of about $100,000 a year for that portion of the business that I am discussing, building parachutes to Government specifications.

Mr. DANIELSON. Did you say——

Mr. RUBIN. $100,000 a year. It has ranged upwards higher than that. At this point it is running about $500,000 a year. Interestingly enough there have been no claims against the corporation running from 1974 through 1979. Over the last 20 years we have had 14 claims against the corporation. There have been two claims made recently. The total claims now open are four. Despite the fact that there were no claims for a long period of time, obviously we continue to insure against the risk. There are many hundreds of thousands of dollars which we in turn pass on to the Federal Government in insurance costs.

We also pass on a charge for the risk we take on such contracts over and above the insurance. Our insurance covers $10 million per incident, for each incident. In an incident involving more than one person, our coverage would be $10 million per person. We feel this insurance is required. We do not see any way to operate without it. However, there is an additional risk if the amount of judgment against us would ultimately be higher than $10 million, so we have a risk factor cost that we compute when we determine our price to the Federal Government on a product such as these parachutes.

Mr. DANIELSON. May I inject a question that may be very simple if I knew the facts? You say it is a $10-million exposure per incident?

Mr. RUBIN. Per incident per person.

Mr. DANIELSON. Suppose there were 10 persons involved. That is the way I understood your question. I cannot see how you get 10 people on the same parachute.

Mr. RUBIN. You have had incidents of two people in one accident, where one chute comes down into another or chutes get fouled up.

Mr. DANIELSON. Oh, yes.

Mr. RUBIN. Basically what we are attempting to do is to protect ourselves against the unknown in a catastrophic accident that could wipe out the company. Now our problems relate to the cost of insurance in great part, and its procurability. It is not easy insurance for us to get, despite the fact that we feel that the premium is extremely high. This last year we had difficulty in placing the insurance.

Insurance companies carry two risks here. One is the risk of payment of damages on a judgment. The other is the cost of defending the action, and I would like to address myself briefly to the proposed legislation, and say that unless the risk of loss were defined widely enough so that indemnification could be sought for cost of defense, including attorneys' fees, we would find it necessary to continue carrying pretty much the same insurance, although we have had very few instances of claims being sustained against the company. The total amount paid out under these policies over the last 10-year period of time is about $20,000 in judgment. However, the cost of defense is such that my best guess is that defending the claims could well come to a figure close to the amount of the premium, so I think for all people involved in the business of supplying product to the Government, defense product particularly, if there were no indemnification for the cost of defense, basically attorneys' fees, the legislation would not mean much. At least it would not mean much to our company.

Mr. DANIELSON. You are stating in effect then that the indemnity for the purpose of satisfying judgments alone would not reach far

enough to make any valuable improvement here. It ought to include the entire picture of attorneys' fees, all the costs involved.

Mr. RUBIN. I feel strongly about it.

The one last point, and then I will be through with my statement. I talked briefly about the costs involved. It is clear to me that the entire cost is passed on to the Government. The cost of our insurance premiums is passed on to the Government, and that must be the case with every defense contractor.

Mr. DANIELSON. It would just about have to be.

Mr. RUBIN. The cost of risk over and above the policy, to the extent that a contractor perceives such risk, is passed along to the Government.

Mr. DANIELSON. Do you set up a reserve for that?

Mr. RUBIN. No. we do not. We charge it off. We make annual charges. They are in the nature of a reserve. We charge them off.

Mr. DANIELSON. It would not show on your financial statement, though?

Mr. RUBIN. No; but it would show in the underlying papers, the underlying figures it would show. It would not show as a captioned item on our P. & L. But in addition to that, the profit of the insurance companies to the extent that they have profit in aircraft products liability insurance is passed on, so that the question that was raised as to what will the cost of this be to the Government, I cannot see how there would be any cost over a long period of time, because obviously it is all going to get passed along at some point, and it is just a question in approaching it as to whether or not in fairness the liability should fall on the manufacturer, and why go through this process of insurance and self-insurance when through legislation such as this the——

Mr. DANIELSON. Sir, would it not be necessary for the manufacturer to maintain the insurance anyway, because there would be a factual determination in each case as to whether or not the manufacturer did in fact follow meticulously the specifications, or whether some variation, some failure to meet the specification, might have been the cause of the accident?

Mr. RUBIN. For those manufacturers who carry insurance, and I do not really have data on that to know whether or not we are unique, there would be some difference. The difference would be in the cost of the premium. I assume that were this law to be in effect, that the cost of aircraft products liability insurance would come down, so there would be some saving. But were this bill in effect, as it now stands, we would carry insurance anyhow, certainly to the extent of the cost of defense.

Mr. DANIELSON. Mr. Harris.

Mr. HARRIS. I am interested in the concept here. What I think I heard you saying would seem to apply to only those companies that exclusively do business with the Government. They do not also have contracts running perhaps with private contractors?

Mr. RUBIN. We do supply sports equipment, which has become quite a large business now to sports jumpers, and we do supply a fair amount of equipment to foreign governments. We carry separate insurance policies for that. In other words, we have a policy that covers liability arising from sales to the U.S. Government. We have separate policies which cover the other instances.

Mr. HARRIS. Do you think that is typical? Do you think every company would have separate insurance policies for that activity toward Government contracts?

Mr. RUBIN. I would not think it is unique. Our insurance broker is one of the large national brokers, and I do not imagine they structured it this way for us particularly—but I do not know.

Mr. HARRIS. Certainly there must be cases where a company's insurance would be with regard to lines part of which may be sold to the Government and part to private.

Mr. RUBIN. Ours is broken down that way. We pay separate premiums, and I would think it is possible that many others do the same.

Mr. HARRIS. The notion of indemnification I think is always an interesting notion to think about, and I have seen it in different contexts. I asked the question about dsicipline. You do not see any increase in cost to the Government by the lack of discipline that would apply here?

Mr. RUBIN. No, I do not. I do not think that applies, particularly when you are dealing with——

Mr. HARRIS. It would not have any particular benefit in bidding?

Mr. RUBIN. Could you repeat that question?

Mr. HARRIS. A good-risk company would not have any particular benefit in bidding over a poor-risk company?

Mr. RUBIN. If there were indemnification?

Mr. HARRIS. Yes.

Mr. RUBIN. I do not really think so, no. I think particularly when you are dealing with lifesaving equipment, I do not see any shifting of burden.

Mr. HARRIS. You do not understand my question, apparently. Apparently if I have got a poor-risk company, I am going to pay a little bit higher premium. I think that is the way the insurance business operates.

Mr. RUBIN. It does not operate that way in this area.

Mr. HARRIS. Whether I am a good or poor risk, I pay the same premium?

Mr. RUBIN. The basic charge on aircraft products liability insurance relates to their general loss experience insofar as aircraft products are concerned. We have made that argument, and as I mentioned, we have had very few claims. We have made the argument we feel that our policy should carry a lower premium because of our own experience, and we have not been able to procure insurance that relates to our specific insurance. We are wrapped up in the actuarial tables with their general experience in aircraft products. I have had this discussion with our broker. If there are a lot of claims in the general aircraft products liability field, our premium goes up. It is not written as——

Mr. HARRIS. So the Government kind of gets taken on this. It is sort of a broad no-fault insurance thing that applies to all industries whether they are safety conscious or not, and the Government pays the bill.

Mr. RUBIN. Judging from our performance, if we were to relate the premiums we pay to the amount paid out, the premiums seem extremely high. Again, I do not know the actuarial basis for the policy. We are happy to get the policy, and right at this point we are negotiating for a policy right now and we are a little nervous about

whether or not we are going to be able to continue the $10 million coverage.

Mr. HARRIS. Mr. Chairman, I am appalled I must say to discover that in fact the insurance industry writes people the same premium whether they are good or poor risk. I think it would help the Government and the taxpayer a great deal if the insurance people changed their policy on this.

Mr. RUBIN. I have some information on this that I can make available to the committee on the basis of the premiums we pay, how they are based.

Mr. DANIELSON. Would you be kind enough to submit them to the committee?

Mr. RUBIN. Yes.

Mr. DANIELSON. As I mentioned a couple of times before, we are going to have to get into this in the next Congress, it is too big a subject for the time remaining this year.

Mr. HARRIS. Thank you, Mr. Chairman.

Mr. DANIELSON. Mr. Moorhead.

Mr. MOORHEAD. I have no questions. I want to thank you for coming this morning and giving us your information.

Mr. RUBIN. Thank you, Mr. Moorhead.

Mr. DANIELSON. Mr. McClory.

Mr. MCCLORY. I would like to just ask a couple of questions, as to what you are not seeking in this legislation. You are not seeking relief or indemnification if, for instance, you have inadequate quality control measures in your production. You are not asking for relief, if there is negligence involved in the development of your product. You are not asking for relief if you produce something which is defective, as far as either material or workmanship are concerned. It is only that you seek relief through this legislation, where you do have good quality control, where you do follow specifications. You do produce in a workmanlike way with materials that are consistent with the specifications, and you are not guity of negligence. You feel you should be entitled to indemnification, if there is a claim which results from the theory of strict liability. Is that correct?

Mr. RUBIN. You have summarized our position correctly.

Mr. MCCLORY. Thank you. That is all. Thank you very much.

Mr. DANIELSON. Thank you, sir. I am not at all knowledgeable in this field, and I understand you to say that you have only four pending claims, that you have had none I think since 1973.

Mr. RUBIN. There were none from 1974 through 1979.

Mr. DANIELSON. While I am not knowledgeable in the field, it seems to me that is a pretty good record. Do you make very many parachutes?

Mr. RUBIN. Yes. We make a fair amount. We are the largest producer of parachutes in the world.

Mr. HARRIS. I have no intention of using one.

Mr. DANIELSON. It just seems to me like that is a very minimal number. Do you make them for the Air Force, for example?

Mr. RUBIN. We do. I do not jump, either, Mr. Harris. You do not have to be a chicken to sell eggs.

Mr. DANIELSON. How many do you make per year that you sell to the Government?

Mr. RUBIN. Our Government sales range upwards of about from $20 to $25 million. Of that, personnel parachutes would account for maybe at most 20 percent of that volume.

Mr. DANIELSON. Twenty percent of that volume.

Mr. RUBIN. And a parachute is roughly $600 or $700, somewhere in that area.

Mr. DANIELSON. You are talking about an awful lot of parachutes, then.

Mr. RUBIN. Unfortunately, for Pioneer, the Government does not buy parachutes in the quantity that they used to. They have become something of an anachronism and are not used that much.

Mr. DANIELSON. At the same time with your exposure, with only four claims pending, with that number of articles that have gone out into the field I would say that sounds like a good record. I do not intend to start using parachutes, but if I do, I am going to buy a Pioneer.

Mr. RUBIN. Thank you, Mr. Chairman.

Mr. MCCLORY. Mr. Chairman, could I make this one comment with regard to the product liability problem.

Mr. DANIELSON. Surely.

Mr. MCCLORY. That is that I do not think that the premium rates are fixed on the basis of poor-risk companies as much as they are on potential risk. The potential risk can be tremendous, and consequently, the premium rates are vitually prohibitive. It is not only with regard to products that are manufactured for the Government, but with regard to products not manufactured for the Government. Product liability insurance problems or liability problems are really extremely serious as far as American private enterprise is concerned.

Mr. RUBIN. I did mention, Mr. McClory, the fact that the premiums do cover the cost of defense, which is quite substantial.

Mr. DANIELSON. Mr. Rubin, we have two bills pending. One of them is H.R. 5358, a private bill for the relief of Stencel Aero Engineering Corp. Are your parachutes structured, are they made any differently than the ones that Stencel made?

Mr. RUBIN. I think the parachute that is involved in the private bill was something that was produced by Stencel I guess on a unique basis. I do not think there was an open bid. I do not think he is here. We do produce obviously parachutes and parachute packages for ejection seats. I am not sure whether or not we produce the exact same parachute.

Mr. BERTELING. Stencel does not produce parachutes.

Mr. DANIELSON. May I have the identity of the gentleman who said Stencel does not produce parachutes?

Mr. BERTELING. My name is Berteling, a consultant to Stencel.

Mr. DANIELSON. You are a consultant who does work for Stencel Engineering?

Mr. BERTELING. I am, sir, and I apologize.

Mr. DANIELSON. We are glad to get the information.

Mr. HARRIS. Did I understand you to say you thought the contract under which this private bill was predicated or upon which this private bill was predicated was a sole-source contract?

Mr. RUBIN. I as-sume it was.

Mr. HARRIS. Sole-source. I believe the gentleman is saying that——

Mr. RUBIN. I assume it was a negotiated contract, not a bid contract.

Mr. HARRIS. Mr. Chairman, I will go into that later. I do not want to hold up the committee, but I do not understand why the parachute business, one manufacturer has such unique competence that you would not go to competitive bid on procurement for parachutes. Why would that be?

Mr. RUBIN. Stencel produces ejection seats, basically not parachutes. There are many instances in which——

Mr. HARRIS. Are they the only one that produces ejection seats——

Mr. RUBIN. They are the only one that produces the Stencel ejection seat, just as McDonnell Douglas is the only one that produces their ejection seat, and there are specific manufacturers who manufacture a specific product in the field of parachutes a great many parachutes are bought on open bids. There are other parachutes in which the manufacturer such as ourselves do research, development, and design and sells a proprietary product to the Government. An example of that would be the chutes we have developed for the recovery of the Space Shuttle booster rockets. Those have been done with our engineering.

Mr. DANIELSON. Your personnel parachutes, are they a proprietary product that you just simply sell to the Government?

Mr. RUBIN. Those chutes sold to the Government are not proprietary. We do produce proprietary parachutes bought by the Government, basically directional and guidance parachutes.

Mr. HARRIS. Mr. Chairman, we have been talking about parachutes this whole time.

Mr. DANIELSON. I think we have been talking about two different things. The Aero thing is an ejection apparatus and the parachutes are for the general bill that Mr. Rubin talks about. The general bill includes everything, not just parachutes. The general bill is very, very broad. Are there further questions?

Mr. HARRIS. I could not agree more, Mr. Chairman. No questions.

Mr. DANIELSON. Mr. Rubin, thank you. Also we thank all of those who have attended this morning and helped us. I think it is quite obvious that the general law bill simply cannot be concluded in the 96th Congress, but at least we are off to a start. Thank you all very much.

The subcommittee will now stand adjourned, subject to the call of the Chair.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional material:]

CONE, OWEN, WAGNER, NUGENT,
JOHNSON, HAZOURI & ROTH,
West Palm Beach, Fla., August 6, 1980.

Hon. LAMAR GUDGER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN GUDGER: I have read with interest your proposed government contractor's product liability act—HR 5351.

I would like to express my opposition to such legislation as currently drafted.

In September of 1974, two GIs while riding in a M151 A–2 Army jeep near Bamburg, Germany were severely injured when the vehicle rolled over and the gas cap disengaged. The driver was burned to death, the right front seat passenger was severely burned over 40 percent of his body.

I represented the survivor, Mark A. Cowheard, in a product liability claim against Ford Motor Company, AM General Corporation and AMC, respectively, the designer and manufacturers of the jeep in question.

All three contractors raised as a defense to the suit the immunity based on their compliance with government specifications.

Extensive discovery in the case which lasted three years and cost our client nearly $70,000, developed the fact that Ford was hired as the engineering contractor on the project. Ford was simply asked to develop specifications for a new gas cap. The Army and the Department of Defense served primarily an administrative review function; reliance was on Ford engineers for the design of the cap.

Ford engineers simply put extensions on the gas cap which resulted in its protruding beyond the sheet metal side of the vehicle. At the time they were paid several hundred thousand dollars for this inept engineering task they were being paid several hundred thousands more to redesign the suspension because M151 A–2s were rolling over in sharp left and right hand turns at speeds as low as 8 miles per hour.

You may recall that in the late 1960's and early 1970's, Senator Ribicoff conducted extensive hearings in Washington to prevent these vehicles from being sold to the public as standard government surplus for fear that it would result in serious injuries and deaths to the American motoring public.

Because there was no such legislation such as you propose, Ford's and AMC Companies defenses did not hold up and the private contractors settled the claim under West German law (though the case was filed in Federal Court in Miami) for $665,000.

As an attorney extensively involved in product liability litigation and as a private citizen, I think we must do our best not to provide a shield behind which inept engineering can be protected, passing the cost on to the general public by having the government "again pay the bill."

If you wish further information on this case, I would be happy to give you the specifics.

The case citation is *Mark A. Cowheard, et ux.*, v. *AM General, AMC and Ford Motor Company*, Case No.: 76–1018 CIV WMH, U.S. District Court, Miami, Fla.

I have sent a copy of this letter to two of the experts who were engaged in this matter.

Dr. Leslie Ball is the former director of ground safety for NASA at the Marshall Space Center, Huntsville, Alabama. He is now retired and extremely knowledgeable in this area. I would suggest that your committee discuss this matter with him. Similarly, Dr. Robert Brenner is the former chief scientist of the National Highway Traffic Safety Administration and was intimately involved in the government's investigation of defects in late model military jeeps in the period 1966 through 1972.

Your attention to this matter is appreciated.

Sincerely,

EDWARD M. RICCI.

AMERICAN BAR ASSOCIATION,
SECTION OF PUBLIC CONTRACT LAW,
Philadelphia, Pa., March 22, 1980.

SECTION COMMENTS

Hon. GEORGE DANIELSON,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN DANIELSON: The Public Contracts Section of the American Bar Association expresses its support for H.R. 5351. The views expressed herein are being presented only on behalf of the Section of Public Contract Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

The problem of product liability of government contracts has been growing more and more severe just as the doctrines of liability without fault for product related accidents has gained wide acceptance by the courts in virtually all jurisdictions. The application of these doctrines to government contractors has in our view been ill advised inasmuch as the policy basis for those no fault doctrines are seldom present in or applicable to such cases. The government contractor is seldom if ever in command of the way his products are designed and used. He has no ability to unilaterally change the specifications in his contract. To the contrary, he is subject to unilateral changes ordered by his Governmental customer. Fre-

quently the Government is the only customer for a given product so he cannot spread the risk of loss aeross the wide market which these doctrines assume. He has seant ability to warn users of possible hazard in connection with his produet nor is he able to effectuate any training in the use of them. Not infrequently, the contractor's product may be used by the Government in vast programs and undertakings which occasion risks of accidents the magnitude of which are not encountered in nongovernmental activities. The bill recognizes the injustice which results from the application of liability without fault doctrines to government contractors and its call for Government indemnification in appropriate cases is a commendable step toward rectifying a serious problem.

While we support the policy reflected in the bill, we believe there are some shortcomings, however, in the bill as drafted. They involve Section 4. As it now reads, paragraph 4(a) is unclear. The first few lines of this paragraph would provide United States Government indemnification if the supplier's liability arose "from a characteristic of a product supplied to the United States Government . . ." which phrase would seem to say that any liability based upon a characteristic of a product would be indemnified even if the contractor were clearly at fault, i.e., negligent. The paragraph goes on, however, to provide an alternative and more restrictive tests by apparently limiting such indemnification to situations where the liability creating characteristics was "required of that supplier by specifications for that product imposed by the United States Government . . ." Expressed as they are in the alternative, these two differing criteria for providing Government indemnification would leave the contractors and the Courts with great uncertainties as to just what type of situations were intended to be covered by Government indemnification. The Courts would have to sort it out and force a reconciliation of these differing concepts. But even assuming that the intent were clear that indemnification was to be provided only in cases where the Government imposed specification was the mechanism which gave rise to the contractor's liability, we are still left with grave uncertainties as to the meaning of the phrase "specifications for the product imposed by the United States Government." It is common in Government programs for the Government to secure a contractor's help in developing a specification to be used in acquiring a product or system of products. Frequently, the Government and its contractors work very closely in a team effort to get as good a set of specifications as is practically possible. When the Government later approves and adopts such specifications and incorporates them into a contract for the supply of such produets, or services, it could he argued that the Government has "imposed" them. But if, as is frequently the case, the same contractor who participated in the development of the specification is the contractor who builds or works to that specification in the production phase of the program, the issue of whether or not the Government "imposed" the specification becomes a highly debatable question.

Further exacerbating the haziness of the Government "imposed" specification criterion is the reality that in many programs the "specification" will be established in the Contract as a goal or objective to be met, if possible, within the state-of-the-art and funds available. The Contractor is obligated to do his best, but the ultimate specification is only adduced after, rather than before, his performance. This scenario is frequently the rule rather than the exception is developmental programs where time constraints are urgent and the needs of the Government are critical.

Inasmuch as the issue of who, when and how a specification is "imposed" is often a blurry issue, we think that a better test would be whether or not the contractor was at fault. In usual legal parlance such fault is best captured within the doctrine of negligence. Was the contractor careful in what he did? Did he meet the prudent man test? Was his negligent conduct the eause of the accident? We think the bill should make it clear that if a contractor did all that was contractually required of him and did it in a prudent manner, that the Government would indemnify any resultant liability arising out of such performanee. Enactment of a law establishing such a policy is both appropriate and long overdue.

In order to reflect this fault (negligence) test, we urge that paragraph 4(a) be revised to substititue this test for those contained in the current language. We also urge that the same test be applied to construction contractors and others who provide a service rather than a product since there is no reason to exclude them from the protection afforded by this policy. To accomplish this revision the following substitute language is suggested:

"Sec. 4(a). The United States Government shall indemnify and hold harmless the supplier and his insurers for any product liability and loss associated herewith

experienced by a supplier of a product or service to the United States Government unless such liability is expressly determined by the court adjudicating the suppliers liability to have resulted from the sole negligence of the supplier."

Note that in this proposed revision we have deleted the criterion limiting indemnification to liability "arising from a characteristic of a product supplied" and substituted a limitation in terms of "any product liability and loss associated therewith". While the "charactertistic of a product" limitation might be judicially construed as being co-extensive with those doctrines of law associated with product liability, the lack of an established history of judicial construction of this phase convince us that it would be clearer and more prudent to expressly declare that the indemnification is intended to cover a supplier's product liability exposures and not such other liabilities as may result from patent and copyright infringement, breach of contract and other exposures not coming within product liability theories and doctrines.

We urge the "sole" negligence exclusion from indemnification since any alternative appears to be impractical or unfair in view of the Government's unique role in liability creating activities involving a supplier's products or services. The Government deals with its suppliers in a monopsonistic manner. It dictates the terms and conditions of its contracts. It supervises and controls the inspection, testing and acceptance of the supplies and services which it procures. It determines and controls the manner, type and circumstances of use and the nature and extent of maintenance. It establishes and is responsible for the safety rules and procedures governing its activities and it determines and controls the nature and extent of the training of using personnel. In short, its control of all the circumstances where there is multiparty negligence at all, governmental negligence would most probably be supervening whereas that of the supplier would in most cases be passive and secondary. Conversely, if a supplier is determined to have been solely negligent it would be clear that the Government's pervasive role and activities did not affect the expected use and performance of the supplier's product or service.

Note that in the revised language we have purposely omitted the final phrase " . . . or unless such supplier has expressly contracted not to be so indemnified." We believe the deletion of this phrase is very much in order since its inclusion would imply to the contracting agencies that it was fair game to attempt to secure such contractural agreements and thus circumvent the policy embraced by the bill. We can foresee the requirement for agreements not to be indemnified being included as part of requests for bids and proposals and having the effect of making such agreements a prerequisite to the award of a government contract. Were this to happen, the policy and intent of the Act would be subverted. To include the phrase in the statute would expressly recognize the propriety of such an approach and ultimately would defeat the purpose of the Act. If the policy reflected in the Act is sound, and we believe it is, we can perceive no situations or circumstances which would warrant its treatment as a bargaining chip between the Government and those who would contract to do its work.

Since in many instances it may be to everyone's best interests to compromise and settle claims rather than carry the litigation through trial to ultimate verdict and judgment, we think the bill should recognize such circumstances and provide for Government approval of such settlements. To this end we suggest the addition of the following provisions at the end of paragraph 4(a):

" . . . provided however, that with respect to settlement or compromise of product liability claims or actions against a supplier, such supplier shall be indemnified under this Section only if and to the extent such settlement or compromise is agreed to, approved or ratified by the Attorney General of the United States or his duly authorized representative or is approved by an appropriate Court in an action seeking indemnification under this statute."

Our revised language also provides indemnification of a supplier's insurers inasmuch as we think it would be inconsistent with the intent of this legislation to do otherwise. If insurer's loss were not to be indemnified the purpose of the legislation could easily be circumvented by stipulating contractual requirements that suppliers must maintain insurance against otherwise indemnifiable losses. Moreover, since the intent of this legislation would still leave the supplier responsible for liability caused by his sole negligence, it would be imprudent for suppliers to terminate appropriate levels of insurance protection. He could attempt to exclude Government indemnified risks from such coverage but this approach would further complicate the risk management burdens already confronted by the supplier and would inevitably work a hardship on some suppliers, particularly small firms who find that doing business with the Government is already too complicated.

In order to provide the Government with timely notice of claims and litigation which may result in indemnification under the statute, we suggest the addition of the following new paragraph (e) to Section 4.

"(e). The supplier shall give prompt written notice to the Attorney General of the United States of any known action or claim filed or made against the supplier with respect to which the supplier may seek indemnification under this statute. Except as otherwise directed by the Attorney General the supplier shall promptly furnish to the Attorney General copies of all pertinent papers received by the supplier or filed with respect to such actions or claims."

In summary, the Public Contract Law Section of the American Bar Association applauds Congressman Gudger and his cosponsors for introducing this important and very needed piece of legislation. The revisions we urge should in no way be construed as indicating disagreement with the overall intent of the bill. To the contrary, they are offered in a spirit of helpful cooperation as being in the ultimate best interests of all concerned—the suppliers, the Government and the victims of accidents in Government-sponsored activities who may in a serious catastrophe find the enactment of this legislation their only hope of just compensation.

Very truly yours,

THEODORE M. KOSTOS, *Chairman.*

Memorandum: Elaboration Of Comments In March 22, 1980 Letter to Congressman Danielson Re H.R. 5351

By letter dated March 22, 1980 the Public Contract Law Section (PCLS) of the American Bar Association submitted its analysis, comments and recommendations on H.R. 5351 to the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee.

Recently, Congressman Lamar Gudger, the author of H.R. 5351, forwarded to the Insurance and Indemnification Committee of the PCLS copies of letters from the Department of Justice, the General Services Administration, and the Office of Consumer Affairs commenting on the bill. These comments were generally and over all negative and opposed to the enactment of the bill.

The following are the main criticisms of the bill contained in the above letters and the comments adopted by the PCLS Council at its November 15, 1980 meeting as an elaboration of the Section's March 22, 1980 letter.

1. The bill would abrogate various immunities which preclude the imposition of tort and other liabilities on the Government under the Federal Tort Claims Act and similar related statutes.

The first of these immunities is the so-called "Feres" doctrine created by the Supreme Court in *Feres* v. *United States*, 340 U.S. 135 (1950). In this decision the Supreme Court determined that even though the statute was silent on the issue, various policy reasons required that the waiver of sovereign immunity effected by the Act did not extend to claims by military personnel arising out of or in the course of active military service.

This judicially created doctrine has been molded and shaped by the Court over the ensuing years, and was used as a prineipal basis for the Supreme Court decision in the Steneel case (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977))—one of the very cases which prompted the introduction of the bill being considered by the Subcommittee. As the Justice Department says, passage of this bill would change the law as enuneiated by the Supreme Court in *Stencel*. In our March 22 letter to Congressman Danielson, we stated our views that this law should be changed, and that H.R. 5351, with some revisions, was a reasonable and appropriate way to legislate such a change. Regardless of how legal scholars analyze or argue over the rationale of the Supreme Court in either the *Feres* or the *Stencel* cases, the fact remains that under current product liability doctrines, government contractors are held liable for damages which we believe in fairness and equity should be indemnified by the government since the government and not the contractor was exclusively or predominently at fault. This fundamental issue of fairness and equity is the very basis for H.R. 5351 and justifies, we believe, the departure from the status quo which it would effect.

2. The bill would abrogate 2680(k) of 28 U.S.C. which precludes the imposition of liability under the Federal Tort Claims Act for "[a]ny claim arising in a foreign country."

The concern here is that the enactment of this bill may result in the indemnifieation of a contractor's product liabilities imposed under foreign rather than United

States law and, even worse, imposed by a foreign court. Here again fairness of the end result should be paramount in any consideration of this bill, we believe. We do point out that there are no territorial or jurisdictional limits to indemnification authorized by existing law (10 U.S.C. 2354) which is cited with apparent approval by the Department and which we address in greater depth later on in comment to paragraph 8, below.

3. The Federal Government cannot be held liable under the "no-fault" strict or absolute liability tort theories since the Supreme Court, in *Laird* v. *Nelms*, 406 U.S. 797 (1972) ruled that the Federal Tort Claims Act doesn't permit suits against the Government on such theories. Hence, to indemnify a government contractor who can be held liable without fault under these theories, would erode this immunity.

Accepting, arguendo, that the *Nelms* case does insulate the government from all fault free tort liability under the Federal Tort Claims Act, it does not follow that the rationale supporting this result in suits against the government under the Federal Tort Claims Act constitutes an argument against enactment of a law which would provide indemnity to a government contractor held liable without fault. To put the issue in bold relief, suppose the government, even against the advice and urgings of its supplier, insisted on procuring an item which contained a known defect which would probably cause an accident killing or injuring someone. Suppose further that the governmental decision to procure such an item would not be such malfeasance or misfeasance so as to overcome the defense posed by the *Nelms* decision. Should a contractor supplying the item, as insisted upon and expressly specified by the government, be denied indemnification when he is later held strictly liable (without fault) on claims it warned the government about in the first place? We believe equity and fairness require that this question be answered "no." H.R. 5351 would provide this answer.

4. Passage of the bill would result in the circumvention of the "discretionary function" exception of 28 U.S.C. 2680(a), the "misrepresentation" exception of 28 U.S.C. 2680(h), and the "independent contractor" exclusion of 28 U.S.C. 2671.

It is true that H.R. 5351, if enacted, would recompense suppliers in instances where the government, because of these limitations or exclusions, would not be suable in tort. It seems to us, however, that such limitations or exclusions should either be extended to apply as a defense to suits by plaintiffs against innocent government contractors or the contractors should be indemnified as contemplated by the bill. It is one thing to say as a matter of policy, "the government won't pay you Mr. and Ms. Injured Victim"; it is another thing to say in effect, "Sue and collect from 'x' my innocent contractor because it's cheaper to have you collect from 'x' than from us (the government)"! By clear implication, these criticisms support the second statement. Put in its simplest terms, these criticisms are another way of saying that even though under current law the government, whether at fault or not, can escape liability for conduct which would result in liability for any other defendant, it is okay to compel an innocent contractor to bear these losses, and this will is objectionable because it would change this result. From our perspective, if the government wishes to maintain these "limitations and exclusions" from liability, it should not do so at the risk and expense of its innocent or at least less blameworthy contractors.

5. The Government, by indemnifying contractors as specified by the bill, would be acting contrary to sound public policy since it would be indemnifying contractors whose contributory fault or negligence caused the accident.

We addressed this point extensively in our March 22 letter. We suggested that Section 4(a) of the bill be revised to make it clear that no indemnification would be provided to a supplier if his liability resulted from his sole negligence. As we explained, we considered the alternatives to this approach to be impractical or unfair under the circumstances of the government's unique and pervasive role in all phases of the acquisition, storage, maintenance, and use of the supplies and services it acquires from its contractors.

6. Indemnification of contractors would discourage "responsible design and manufacturing."

This criticism seems to ignore the government's usual rigorous inspection and testing requirements. It also fails to recognize the ultimate impotence of government contractors to unilaterally incorporate or insist on design or product changes which a contractor may deem to be necessary for product safety. This is true because the government as a monopsonistic buyer generally dictates the terms, conditions and other provisions of its contracts. Hence, the government has

primary and ultimate control of the research, design and testing which the contractor is to perform. In our view, control and responsibility cannot be separated, and if the government controls such functions then the government's responsibility for such research, design and testing constitutes a formidable argument in support of indemnification rather than denial of it. In cases where the government buys a proprietary item which has not resulted from government controlled research, development and design, a contractor's culpability and liability for negligence neither caused nor participated in by the government should be the contractor's responsibility and he should not be indemnified.

Our suggested revisions to the bill would produce this result. Thus, the risk of liability for negligently performed independent design and/or manufacturing would continue to encourage a contractor to be careful, even if H.R. 5351 (revised as we have recommended) were passed.

7. The Government may adapt and buy (especially food and drugs) in accordance with general commercial standards and specifications and it would be wrong to indemnify a contractor whose liability resulted from such non-Government generated standards and specifications.

The point of this criticism is very similar to the preceding one and as we have pointed out, the government supplier deals with his governmental customer in accordance with the government's terms. We lawyers say that government contracts are "contracts of adhesion." The contractor must adhere to the government's way of doing business. In any event, in transactions with the government, it is virtually impossible for suppliers to deal directly with the actual ultimate user of the items supplied. The government not only controls the testing, inspection, storage, distribution and training in the use of the item, it also absolutely controls the labelling and packaging. Hence, such importance matters as warnings, safeguards, propriety of use, etc., are beyond the control of the supplier. The sum total of such considerations, we believe, supports indemnification unless the cause of the damages is clearly attributable to the negligence of the supplier and not that of the government. Our suggested revision to Section 4(a) of the bill is compatible with this result.

8. 10 U.S.C. 2354 already authorizes indemnification of contractors engaged in DOD research and development involving unusually hazardous risks—hence H.R. 5351 isn't needed. (At least for DOD procurements.) Also, "cost-plus" contracts already provide contractors with adequate indemnification coverage, again negating the need for H.R. 5351.

The answer to these criticisms requires a thorough examination of existing DOD procurement policy, practices, regulations and enabling law. First, there is the issue of "unusually hazardous" risks. 10 U.S.C. 2354 does permit DOD research and development contractors to be indemnified, but only if their work involves "unusually hazardous" risks. While the legal definition of this phrase is uncertain, we believe the meaning usually associated with the phrase is generally encompassed within the "abnormally dangerous things and activities" doctrine derived from the celebrated English case of *Rylands* v. *Fletcher*.[1] This doctrine applies to such risks as are associated with explosives, poisons and similar nasty or hard to handle materials. Obviously, there is a higher risk of accident when a contractor works on such things, but the risk (as far as potential liability is concerned) does not go away when a contractor performs a production contract involving such things rather than research and development work involving them.

Hence, indemnification under 10 U.S.C. 2354, limited as it is to R&D, is inadequate. While the Justice Department comments didn't address it, the Congress was persuaded by this inadequacy when it passed Public Law 85-804, codified at 50 U.S.C. 1431-1435. This statute, together with its implementing Executive Orders, authorizes DOD and certain other federal government agencies to indemnify "unusually hazardous" risks in defense related production contracts. However, the problem with both these authorities is that the "unusually hazardous" criteria, as construed by the agencies, is much too narrow and unduly restricts their use since it is the nature of the activity and not the magnitude of the potential disaster which is deemed to be the criteria permitting indemnification. Hence, when this unusually hazardous criterion is met, indemnification may be agreed to even though the maximum foreseeable damages resulting from an accident attributable to such a risk may be quite small. Ironically, under these

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[1] *Fletcher* v. *Rylands*, 1865, 3 H&C 744, 159 Eng. 737, reversed in *Fletcher* v. *Rylands*, 1866, L.R. 1 Ex. 265, affirmed in *Rylands* v. *Fletcher*, 1868, L.R. 3 H.L. 330.

prevailing concepts, if the risk is not considered an unusual hazard (in this narrow sense), the contractor cannot be indemnified even though the maximum foreseeable damages arising from an accident are a thousand times greater than those which may be indemnified as unusual hazards.

Examples of such activities which have been deemed to be nonindemnifiable because they do not involve "unusual hazards" include: the manufacture of parachutes, aircraft ejection systems, guidance and control systems for aircraft, rockets and missiles (including the Space Shuttle), and air traffic control and navigation systems, to mention but a few. In summary, the perceived restrictions on use of the existing indemnification authorities has so severely limited their use that it has been the conclusion of every group which has studied the question that these authorities are inadequate and that additional legislation is required. This conclusion was most recently officially reaffirmed by the U.S. Government Procurement Commission which, in its Final Report,[2] recommended that new contractor indemnification legislation be passed.

Before we leave this point we note that some interest that the Justice Department refers to existing indemnification authority as a basis for concluding that H.R. 5351 is not needed. To be sure, the existence of these authorities is by no means the only reason given for objecting to this bill, but beyond the "not needed" conclusion, their overall main argument is that passage of this bill will wreak mischief and violate the Department's concept of "sound legal principles, logic and common sense." Presumably then, H.R. 5351, unlike the existing authorities under which indemnification may be provided, would provide indemnification improperly and without due regard for the many points and considerations which an indemnification statute should in the Department's view, address and incorporate.

Interestingly, the one statute which the Department cites, 10 U.S.C. 2354, addresses none of the points and considerations which the Department considers such important bases for objection to H.R. 5351. Public Law 85–804 is even worse. It doesn't mention indemnification at all. One must consult the legislative history to establish that indemnification of contractors was one of Congress' intents in passing that Act. The failure of these existing laws to address the many points of criticism and objection raised by the Department with respect to H.R. 5351 might certainly be expected to have generated grave problems and produced some demonstrably bad results. If they have, then certainly this Subcommittee should analyze and study them before having done with H.R. 5351. Frankly, the only significant problem we associated with these existing authorities is, as we have mentioned earlier, their use is too restricted, and they are inadequate to solve the overall problem. To reiterate, indemnification provided under existing authorities is not made subject to a laundry list of conditions such as insisting that the contractor be free from contributory fault or negligence, that he be in compliance with government specifications, that the claim was from a domestic plaintiff and tried in a U.S. Court, that the claimant wasn't an active duty military person, etc., etc. The indemnification given under these statutes is without strings. H.R. 5351, appropriately revised as we recommend, would not go so far—it would deny indemnification of a supplier whose sole negligence was the cause of the accident.

(The Justice Department also refers to indemnification under "cost plus" contracts. It is not clear, exactly, as to what they are referring. We suspect that they refer to the so-called "Insurance: Liability to Third Parties (1966 Dec)" clause set forth in DAR 7–203.22 and similar clauses in other procurement regulations. If this is the case, we must point out that there is long-standing and substantial debate as to the intent and scope of this provision. However, if the Department of Justice believes this clause creates a product liability indemnification obligation which survives the delivery and acceptance of the supplies or services, certainly then H.R. 5351 could be revised to eliminate its applicability to cost type contracts which contain this provision. Here again, however, we must note that this clause has been around for quite a few years and has generated no apparent opposition based upon the concerns which the Department has voiced regarding H.R. 5351.)

9. Under H.R. 5351 indemnification payments would be made to contractors to compensate for claims which, under the Federal Tort Claims Act, the Government

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[2] U.S. Government Procurement Commission Final Report, Volume II, Study Group No. 8, at page 613, et seq.

would otherwise not have to pay. This would result in greater costs to the Government.

This criticism is conceptually identical to the point raised by the Justice Department in referring to the *Feres* doctrine and the *Stencel* case discussed above.

10. Under H.R. 5351 "the Government could be liable as indemnitor to non-Government users of a contractor's product simply because its characteristics are also prescribed by a Government specification.

We do not see language in the bill which supports such a conclusion.

11. The Government is moving in the direction of "eliminating Government unique specifications" and using instead Commercial Item Descriptions which "reflect commercial practices, rely predominantly on voluntary standards and include functional and performance requirements in the form of key salient characteristics to define quality levels or intended application." Hence, H.R. 5351 is undesirable in that it would hold the Government liable as indemnitor of liability arising out of a supplier's commercial, off-the-shelf products.

As indicated in our March 22 letter, we too have problems with the current language of Section 4(a), and particularly with the "government imposed specification" criterion. We have similar difficulties with a test which would apply a distinction based upon whether or not the suppliers or services were considered "commercial, off-the-shelf" since such a test would result in virtually the same definitional problems as encountered in dealing with the "government imposed specification" test. Further, as we discussed in our letter, even if the supplier delivers an arguably "commercial, off-the-shelf" item, the government's unique role as a monopsonistic buyer and user would justify in most cases the indemnification of the supplier's product liability losses occasioned by the transaction. In those cases where it was clear that the supplier's fault and not the government's was the cause of the accident, equity and fairness do not dictate indemnification. Consequently, our recommended revision of Section 4(a) incorporated a fault based, supplier's negligence test to determine whether or not a supplier would be indemnified. We continue to believe that this is, overall, a more viable and practical criterion than one involving a determination of who generated the specifications.

12. Enactment of H.R. 5351, by indemnifying suppliers, would encourage suppliers "to refrain from telling the government that a government-imposed specification could result in an unsafe product when a supplier has knowledge of the hazard."

As it stands right now, even if a supplier does warn the government of a hazard in a product he does not have the ability to change the design and eliminate the defect—nor does such notification or warning to the government constitute a defense to a third party suit against a government contractor. *Barr* v. *Brezina*, 464 F. 2d 1141 (1972), cert. denied, 409 U.S. 1125 (1973). Furthermore, to unjustly penalize innocent contractors in order to induce potential suppliers to tell the government when it has a faulty specification seems to us to be going about the problem backwards. There are many ways that the government can secure safety related warnings and criticisms of its specifications. It could, for example, make sure that its procurement specifications are thoroughly reviewed by appropriate experts; it could provide awards and bonuses for the adoption of safety related specification changes. To deny equitable and fair treatment of its suppliers in order to encourage such disclosures seems unjustified to us.

13. Procurement by government specifications (and, therefore, the risk of accident due to unsafe government specifications) is being reduced by the new requirements of OMB Circular A–119. Therefore, the circumstances of suppliers' liability envisaged by H.R. 5351 (specifications imposed by the U.S. Government) will become increasingly rare.

Even if we were as optimistic as is the Office of Consumer Affairs with respect to the potential rarity of the use of government specifications, we would still support the enactment of this bill since it is directed at rectifying the injustice of holding a fault-free supplier liable while completely shielding a blameworthy governmental customer. This is sound policy even if only applied in rare cases.

14. Enactment of H.R. 5351 could be a precedent for the principle of government indemnity and this precedent could be easily applied to the situation where government regulations required modification of a product, which modification later posed a threat to U.S. consumers and others.

In response, we again point out that the principle of indemnity is already accepted in 10 U.S.C. 2354, 50 U.S.C. 1431–1435 (Public Law 85–804) and (although not discussed here), 41 U.S.C. 2210 (the Price-Anderson Act). As we have said earlier, H.R. 5351 would provide indeminfication in situations not

covered by these statutes where we believe fairness and equity justify it. To object to its enactment because of perceived precedental effect on the justification of additional legislation is, in our view, an insufficient argument. H.R. 5351 should be considered on its own merits and stand or fall on that basis.

15. The overall costs to the Government would be greater if H.R. 5351 were enacted.

Ultimately the costs of an accident are borne by someone. First, by the victims themselves and then later, via the laws and the courts, they may be shifted to others who are deemed to be appropriate transferees of such costs. Absent government sponsorship of a risk-creating enterprise, present legal doctrine allocates such risks either to the manufacturer of the product which caused the accident—if it was defective or negligently produced—or to the person who engaged in the activity which caused the accident—if such activity is considered abnormally dangerous. Insurance is resorted to by private individuals to protect themselves from being wiped out by liability for such man-made disasters. If the potential risks are so large that such protection is inadequate or unavailable, it is presumed that the activity will not be pursued and the risks will not be run. However, when the federal government undertakes an activity the doctrine of sovereign immunity insulates it from all tort liabilities other than those permitted under the Federal Tort Claims Act. As is evident from the Justice Department's comments and our earlier discussion, there are a variety of limitations, exemptions, exclusions, doctrines and exceptions to the waiver of immunity from suit effected by the Act Collectively, these limitations drastically reduce the likelihood of a plaintiff's success in a suit against the government. As a consequence, a blameless government contractor becomes a much more convenient, and in many cases the sole, defendant. Under the continuing pro-victim liberalization of our product liability laws by our courts, the contractor defendent is a relatively easy target.

This state of affairs was addressed and commented upon in the recent case of *Henry* v. *Bell Textron*,[3] where the court observed (after citing the *Stencel* case, supra,) that while the suit-proof government was primarily responsible for the crash of the helicopter and the ensuing damages, nonetheless, the contractor "is placed in a very difficult position by the expanding doctrines of product liability and the relatively inflexible doctrines of sovereign immunity and Eleventh Amendment immunity, but unfortunately for it the law is clearly against [the contractor who was seeking government indemnification]." While indemnifying suppliers such as Bell Textron would occasion some direct transfer of costs from contractor defendants to the government, enactment of H.R. 5351 would also occasion some savings to the government in the form of reduced costs of insurance (when and if reasonably available) related to government contract activities. Certainly such reduced costs would be reflected in the cost of the supplies and services which the government acquires. Overall then the issue of added cost must be considered along with such reduced costs, as well as the issues of fairness and equity inherently bound up in the problem the bill attempts to solve.

[3] *Henry* v. *Bell Textron, et al.* 577 F. 2d 1163 (4th Cir. 1978).

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